Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SAMUEL FIRESTONE, CALVIN MIYASHIRO, JACK PUTNAM and BRIAN FRAZEN,

Petitioners,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state statute or regulation fixes a minimum labor standard requiring employers to pay their employees a "premium wage rate" which is greater than their "regular rate" for all work in excess of 8 hours in one day and 40 hours in one week, do the terms "premium wage rate" and "regular rate" as found in that standard require the interpretation of a collective bargaining agreement such that any claim by a union employee to enforce the standard is preempted by Section 301 of the Labor Management Relations Act?

2. If the answer to the first issue is yes, can a state statute or regulation allowing unions to "opt out" of its minimum labor standards fix as its test for whether a union has elected to opt out a procedure which requires the interpretation of a collective bargaining agreement without having the opt-out test itself be preempted under Section 301 of the Labor Management Relations Act?

3. If a claim created by state law requires the interpretation of a collective bargaining agreement, does preemption by Section 301 of the Labor Management Relations Act require that the claim be substantially extinguished?

PARTIES BELOW

The parties named in the caption herein are all of the parties in the Court of Appeals and in the District Court. Although in the captions in both courts below petitioners purported to sue on behalf of all other present and former employees similarly situated, no class was ever certified.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Samuel Firestone, Calvin Miyashiro, Jack Putnam and Brian Frazen respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in *Samuel Firestone, Calvin Miyashiro, Jack Putnam, and Brian Frazen, individually and on behalf of all other present and former employees similarly situated, v. Southern California Gas Company*, 219 F.3d 1063 (9th Cir. 2000), as amplified by its opinion denying rehearing, 281 F.3d 801 (9th Cir. 2002).

OPINIONS BELOW

The July 14, 1998 opinion of the United States District Court for the Central District of California (the "District Court") granting defendant-respondent summary judgment is unreported, but is reproduced in the Appendix at 14a. The original opinion of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") is reported at 219 F.3d 1063 (9th Cir. 2000) and is reproduced in the Appendix at 4a. The Ninth Circuit's opinion denying rehearing is reported at 281 F.3d 801 (9th Cir. 2002) and is reproduced in the Appendix at 1a.

JURISDICTION

The Ninth Circuit rendered its original opinion affirming in part and remanding in part the final order of the District Court on July 19, 2000. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit rendered its opinion denying this petition on February 12, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the preemptive effect on state-law wage and hour claims of federal labor law, primarily Section 301 of the Labor Management Relations Act, 1947 ("Section 301"), 29 U.S.C. § 185, and the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq.* The text of Section 301 is reproduced in the Appendix at 47a.

The state-law claims at issue arose out of a California regulation, commonly referred to as "Wage Order No. 4-89," which was found at Title 8, California Code of Regulations § 11040. Relevant excerpts from the regulation, which has since been modified several times, are reproduced in the Appendix at 49a.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by a group of union employees contending that defendant-respondent Southern California Gas Company ("SCGC") violated both Section 7 of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 207 (the first claim for relief), and comparable California wage and hour law (the second claim for relief) in the manner in which it computed overtime rates on a daily basis for its meter readers.[1] Petitioners do *not* seek a writ of certiorari regarding their dismissed FLSA claims.

With respect to Petitioners' claims under California wage and hour law, California's Labor Code empowers the California Industrial Welfare Commission (the "IWC") to fix by regulation the minimum wages (*see* Cal. Labor Code § 1182) and maximum hours, as well as other minimum labor standards (*see* Cal. Labor Code § 1178.5), for California employees. At the time this case arose, the regulation applicable to Petitioners (and other similarly situated employees) was commonly referred to as Wage Order No. 4-89 and provided in part as follows:

> 3. HOURS AND DAYS OF WORK.
>
> (A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times the employee's regular rate of pay for all work over eight (8) hours in any workday or in

[1] Because of circumstances not relevant to the case, Petitioners were represented by two unions, the Utility Workers of America and the International Chemical Workers Union Council of the UFCW, AFL-CIO.

excess of forty (40) hours in any workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's *regular rate* of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's *regular rate* of pay for all hours worked in excess of twelve (12) hours in any workday, and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

* * * *

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides *premium wage rates* for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

Title 8, California Code of Regulations § 11040(3)(A) and (G) (emphasis added).

Petitioners claimed below that SCGC violated Section 3(A) of this Wage Order in the manner in which it computed their daily overtime. Although admittedly "covered by a collective bargaining agreement [which provided] a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage," Petitioners contended that the collective bargaining agreement did *not* "provide[] premium wage rates for overtime work" within the meaning of Section 3(G), so that their unions had not effectively "opted out" of the provisions of Section 3(A).

Specifically, Petitioners contended that SCGC's practice (to which Petitioners' unions had agreed) did not compensate them for all overtime hours that they worked, a practice which Petitioners contended was unlawful under California law. SCGC contended that it merely was trying to calculate Petitioners' "regular rate" by dividing a flat sum paid to Petitioners for a particular meter-reading route by the total number of hours worked, but that its computer system could not handle the resulting fluctuating rates. Accordingly, it was forced to use a formula which did reduce the number of overtime hours for which Petitioners were compensated. Petitioners responded by contending that, under California law, a fixed rate paid on a daily basis could only be divided by 8 to arrive at the employee's "regular rate."

On July 14, 1998, the District Court entered an order granting SCGC's motion for summary judgment. Appendix at 14a. The District Court concluded that the Petitioners' state-law claim regarding the manner in which SCGC calculated overtime rates on a daily basis was preempted by Section 301. On appeal, the Ninth Circuit affirmed the District Court essentially for the same reasons given by the District Court, Appendix at 4a, and later denied Petitioners' petition for rehearing and suggestion for rehearing *en banc.* Appendix at 1a. The net effect of these decisions has been to extinguish Petitioners' state-law wage and hour claim without any determination on its merits.

B. Statement of the Facts

As noted above, the State of California has delegated to the statutorily created IWC the power to fix by regulation minimum wages and other minimum working conditions, including maximum hours. Pursuant to its regulatory authority, the IWC has adopted several "Wage Orders," each applicable to a particular industry or occupation. The parties have agreed that the Wage Order that was applicable to SCGC until January 1, 1998 was Wage Order No. 4-89,

which was found in Title 8, California Code of Regulations § 11040 (hereafter, simply "Wage Order No. 4-89").[2]

Until January 1, 1998, Section 3(A) of Wage Order No. 4-89 provided that an employee could not be employed for more than forty (40) hours in one work week or more that eight (8) hours in one day unless the employee was paid at a *"premium rate"* equal to "one and one-half (1½) times such employee's *regular rate*" for all hours worked in excess of forty (40) hours in one work week and in excess of eight (8) hours in one day.[3] A primary purpose of this regulation was to actually discourage employers from working employees for more than 8 hours in one day. *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal.App.3d 239, 254 (1985); *accord Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 713 (1980) (upholding wage statement of IWC providing that overtime compensation is "a premium or penalty pay for overtime work to regulate maximum hours"). Indeed, this section went on to provide that an employee was to receive "[d]ouble the employee's regular rate" for all work in excess of twelve (12) hours in one day.

Section 3(G) of Wage Order No. 4-89 then provided that the overtime provisions of Section 3(A) automatically did not apply to any employee who had exercised his or her federally protected right under Section 7 of the NLRA, 29 U.S.C.

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[2] Effective January 1, 1998, Wage Order No. 4-89 was amended by the IWC in Wage Order No. 4-98 which, among other things, eliminated the 8-hour day. Effective January 1, 2000, the 8-hour day was restored to California's workers, albeit now by statute. *See* Cal. Labor Code § 510 *et seq.* The current Wage Order, Wage Order No. 4-01, tracks the language of the new statute with respect to overtime.

[3] Given that the Wage Order quoted by the Ninth Circuit makes no mention of the overtime premiums required to be paid after 8 hours (7a), it appears to be Wage Order No. 4-98, which was not effective until January 1, 1998, and not Wage Order No. 4-89, the Wage Order upon which Petitioners' state-law claims were based.

§ 157, to bargain collectively and whose union had succeeded in negotiating a collective bargaining agreement that (i) provided *"premium wage rates for overtime work"* and (ii) required that the employee be paid a cash wage "not less than one dollar ($1.00) more than the minimum wage."[4] Petitioners admittedly were covered by a collective bargaining agreement that required them to be paid a cash wage "not less than one dollar ($1.00) more than the minimum wage." Nevertheless, Petitioners state-law claim essentially alleged that, even if Section 3(G) were a valid opt-out provision not itself preempted by Section 301 (as the Ninth Circuit later found), SCGC's method of paying overtime did not provide for "premium rates for overtime work" within the meaning of this section of the Wage Order, and Petitioners thus were entitled to overtime compensation in accordance with Section 3(A) of the Wage Order. Stated differently, Petitioners contended that their unions did not effectively opt out of Section 3(A) standards.

The Ninth Circuit accurately summarized the relevant facts as follows:

> In 1995, the plaintiffs' unions and the employer, Southern California Gas Company (SCGC), *agreed to a compensation arrangement set forth in a document entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes" (PPR document).* Under the Pay-Per-Route system, all meter readers were paid flat sums for completing meter reading routes of assigned lengths, even if it took less than the estimated time to complete the routes. The flat sum for each route was calculated by multiplying the hourly rate set forth in the

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[4] Given that the citation in the Ninth Circuit's decision is to Section 3(D) and not 3(G) (Appendix at 7a), Petitioners again suspect that the Circuit was relying upon Wage Order No. 4-98 and *not* Wage Order No. 4-89.

> collective bargaining agreement ($16.56 per hour) by the amount of time it was expected to take to complete the route.
>
> Meter readers who worked more than 8 hours in one day received an adjustment to the flat sum normally paid. The method of calculating compensation for these hours is the subject of some dispute by the parties. *According to the PPR document itself*, the unassigned overtime hours posted were computed as follows: (assigned hours/actual hours) X .3334 X (actual hours—8). That figure was then multiplied by one and one-half the hourly rate set forth in the collective bargaining agreement and added to the flat rate for the assigned hours. SCGC contends that the total pay for a meter reader who worked unassigned overtime was actually calculated by dividing the flat sum by the total number of hours it actually took to complete the route to arrive at the employee's "regular rate" for that day. The meter reader would then receive one and one-half times that regular rate for hours worked beyond 8 per day, added to 8 times the "regular rate" for that day. The difference between the formula contained in the PPR document and that allegedly used by SCGC apparently resulted from the inability of SCGC's computerized payroll system to handle variable rates of pay. These formulae yield almost the same result, however, *plaintiffs contend that under either one the defendant violates state wage and hour laws by failing to provide a "premium" wage rate for overtime work.*

Appendix at 6a to 7a (emphasis added).[5]

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[5] So that it is clear to this Court, it is undisputed that Petitioners' unions *actually agreed to* and SCGC *actually used* the formula contained in the written PPR document for purposes of computing Petitioners' overtime compensation. Excerpts of Record filed with the Ninth Circuit (hereafter, simply "ER") 116-17, 119-20, 151-52. That is, SCGC actually reduced the number of overtime hours for which an employee was compensated by using the complicated formula recited in the Court of Appeal's decision ("(assigned hours/actual hours) X .3334 X (actual

Petitioners contended "that under either one [of the formulae] the defendant violate[d the then existing] state wage and hour laws" because, under California wage and hour law, any flat sum paid to an employee (such as a flat sum per route) may only be divided by the "maximum hours" allowable under state law on a daily basis (if the flat sum is paid on daily basis) or by the "maximum hours" allowable under state law on a weekly basis (if the flat sum is paid on weekly basis) in order to determine the employee's "regular rate." *See Skyline Homes, Inc., supra*, 165 Cal.App.3d at 245 (weekly flat sum must be divided by 40—and not the actual number of hours worked—to determine an employee's "regular rate"). Thus, if SCGC's "perception" of its compensation method (*i.e.*, how it would have paid overtime compensation if its computer could have handled it) is used, it violates California law because it divides the daily flat sum by the total number of hours worked, and not by 8—the then maximum allowable daily hours.[6] Conversely, if the formula

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hours—8)"). Admittedly, this formula ultimately resulted in the same daily pay as dividing the flat sum paid per route by the total number of hours worked to arrive at a fluctuating hourly rate of pay.

This reduced hours formula was used precisely because SCGC's computerized payroll system could not handle the "variable rates of pay" that resulted from using the other formula. "[T]he PPR [document to which the unions actually agreed] was only an accounting device to make the Pay-Per-Route system compatible with the Company's automated payroll system." SCGC's Opening Brief to the Ninth Circuit at 8-9. Petitioners readily accept the fact that SCGC intended to use the fluctuating rate formula, but could not because of its computer's limitations.

[6]Although the Ninth Circuit found this practice to have *not* violated the FLSA, "[t]he IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection [for employees] then is provided under federal law in the Fair Labor Standards Act." *Ramirez v. Yosemite Water Company*, 20 Cal.4th 785, 795 (1999). Thus, a practice which clearly does not violate the FLSA may still violate

explicitly articulated in the PPR document (*i.e.,* the actual document to which Petitioners' unions agreed and which was actually used by SCGC) is used as the test by which SCGC's compensation method is judged, it violates Wage Order No. 4-89 because it failed to compensate employees for all hours they were "engage[d], suffer[ed] or permit[ted] to work." *See* Section 2(E) of Wage Order No. 4-89.

C. The Proceedings in the Ninth Circuit

Notwithstanding the fact that the parties had agreed that the written document to which Petitioners' unions actually had agreed contained the formula actually used by SCGC's computer system to calculate overtime payments and the fact that Petitioners did not dispute that SCGC would have used the other formula if its computer system were capable of handling the fluctuating rates of pay generated whenever an employee worked more than 8 hours, the Ninth Circuit concluded that there was a dispute concerning these facts. More importantly, the Ninth Circuit concluded that the disputes arose under a collective bargaining agreement and therefore were preempted by Section 301.

Specifically, the Ninth Circuit held:

> According to plaintiffs, they are not paid a "premium rate" because the rate they ultimately receive for overtime hours is lower than the standard rate of $16.56 per hour used to calculate the flat rate for each route. Thus, argue plaintiffs, they actually receive lower wages for overtime hours than they receive for scheduled hours. On the other hand, because the employer perceives the "regular rate" to be the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day, the employer

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California wage and hour law. *Id.* (citing cases, including *Skyline Homes, Inc., supra*); *Morillion v. Royal Packing Company*, 22 Cal.4th 575 (2000).

> maintains that plaintiffs are paid a rate for overtime work that includes a "premium" equal to 50% of the regular rate for that day.
>
> The parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law. To resolve that dispute, it would be necessary to apply California law to determine the overtime rights and obligations of the parties to the agreement. The claim is not "independent" of the collective bargaining agreement under federal premption law. *See Lingle*, 486 U.S. at 407, 108 S.Ct. 1877.

Appendix at 8a.

The Circuit then opined as follows:

> This case illustrates that problem well, for if California law were to apply, the parties negotiating the agreement would not know whether the employer's overtime obligations were defined by the contract or not, depending on which rate a court determined was the "regular" rate under the California law. The claim is preempted.

Id. at 9a.

In its decision denying rehearing, the Ninth Circuit further explained its rationale for holding Petitioners' state-law claims preempted by Section 301 as follows:

> In our original opinion in this case, we held that resolution of plaintiffs' state law overtime claim would require interpretation of the agreement, because plaintiffs are not entitled to any overtime under state law if they are paid a "premium" for overtime work above the "regular rate" of pay in the contract. *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000). The parties in this case disagree about which rate in the contract is the "regular" rate and, thus, disagree on whether plaintiffs are receiving a "premium" for overtime work. Resolving this question, we held, requires

> interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accepted.

Appendix at 2a.

D. The Companion Proceedings in the State Courts

In April 1998, while this action still was pending in the District Court, the State of California, by its Labor Commissioner, sued SCGC in state court over the exact same overtime practice with respect to the exact same class of employees (meter readers). Stated differently, California's Labor Commissioner contended that SCGC violated its statutes and regulations exactly as Petitioners claimed. Unlike Petitioners, however, California prevailed in most of its claims.

Contrary to the Ninth Circuit, the California Court of Appeal has now held (as Petitioners argued below) that the terms "regular rate" and "premium rate" are determined not be interpreting a collective bargaining agreement, but by interpreting the Wage Order. *Millan v. Southern California Gas Co.*, 2002 Cal.App. LEXIS 2889 (2002), Appendix at 45a.[7] The California appellate court also held that, when interpreting these phrases, courts should defer to the interpretation given to them by the state's Labor Commissioner. *Id.* Finally, and most importantly to this petition, the court held that the state's claims were not preempted by Section 301. *Id.* at 44a.

Petitioners concede that, given the California Court of Appeal's construction of Wage Order No. 4, there is very

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[7] At the time this petition was sent to the printer, this case was not yet officially reported. Accordingly, as an aid to the Court, the complete opinion of the California Court of Appeal is reproduced in the Appendix at 32a.

little left of their state-law claims. *See* Appendix at 45a-46a.[8] However, as will be shown below, the Ninth Circuit's opinion is clearly erroneous, and there are many opt-out provisions in California law to which this erroneous decision may be applied. *See, e.g.*, Cal. Labor Code §§ 227.3 (allowing union to opt out of vested vacation pay), 514 (allowing unions to opt out of statutory overtime provisions), and 554 (allowing unions to opt out of seventh day of rest).

REASONS FOR GRANTING THE WRIT

There are several important reasons why a writ of certiorari to the Ninth Circuit should issue. First, the Ninth Circuit's opinion conflicts with this Court's decisions in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), and *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). Second, this Court should resolve the conflict between the Ninth Circuit and the California Court of Appeal. And third, even assuming that the Ninth Circuit's opinion is correct (and that the California Court of Appeal's decision is therefore wrong), the Court would settle an important issue of federal preemption left unresolved by *Livadas*: whether "[h]olding the plaintiff's cause of action substantively extinguished [is] always [] the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." 512 U.S. at 124 n.18.

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[8] If their state-law claim is reinstated, Petitioners could argue that, on this issue, the California Court of Appeal erred. Specifically, Petitioners could argue that either a union's collective bargaining agreement meets the opt-out test of Section 3(G) or it does not and that, if it does not, the agreement cannot be applied to opt out of the Section 3(A) standard sometimes but not others. Petitioners have been advised that the California Labor Commissioner is seeking rehearing on this issue.

I. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THIS COURT'S DECISIONS.

The heart of the Ninth Circuit's rationale for its decision is that, because Petitioners argued that, under either formula, their "regular rate" could only be determined by dividing their flat daily rate by 8 while SCGC argued that their "regular rate" was "the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day," "[t]he parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law." Appendix at 8a. But "regular rate" is not a contractual term, it is a regulatory term plucked right out of the applicable Wage Order, *not* the collective bargaining agreement. Given this simple fact, this Court long ago recognized that:

> The regular rate . . . is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment, the determination of the regular rate becomes a matter of mathematical computation, the result of which is *unaffected by any designation of a contrary 'regular rate' in the wage contracts.*

Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424-25 (1945) (emphasis added). Thus, "[t]o discover that [regular] rate, . . . we look *not to contract nomenclature* but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945) (emphasis added).

Simply put, as this Court and the California Court of Appeal have recognized, it matters *not* whether SCGC reduced the number of overtime hours in order to calculate Petitioners' overtime compensation (as the PPR Document stated) or whether it simply divided the flat sum paid to determine an hourly rate under the collective bargaining

agreement; the determination of whether Petitioners were paid a "premium wage rate" above their "regular rate" as required by Wage Order No. 4-89(3)(G) is a simple "mathematical computation" using California wage and hour law, *not* the collective bargaining agreement. *Youngerman-Reynolds Hardwood Co., supra*, 325 U.S. at 424-25; *Millan v. Southern California Gas Co., supra*, at 44a. But even if the Ninth Circuit were right, and the determination of whether Petitioners were paid a "premium wage rate" above their "regular rate" (as required by the opt-out provisions of Section 3(G) of Wage Order No. 4-89) "requires interpretation of the agreement" (2a), what then is preempted, Petitioners' claim or the opt-out provision of Wage Order No. 4-89?

To answer this question, Petitioners first note that it is now beyond dispute that "the establishment of [minimum] labor standards falls within the traditional police power of the state," and will not lightly be held to be preempted. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). However, "'it would turn the policy that animated the [NLRA] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employees.'" *Livadas v. Bradshaw, supra*, 512 U.S. at 129 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

Thus, it is equally well established that, in fixing a minimum labor standard (such as the maximum number of hours an employee can be required to work without a premium), states may not simply "withdraw state benefits" from employees because they exercised their federal right to join a union. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Simply put, any minimum labor standard must treat "individual union and nonunion workers alike, and thus 'neither encourage[] nor discourage[] the collective-bar-

gaining processes that are the subject of the NLRA.'" *Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 20-21 (quoting *Metropolitan Life Ins. Co., supra*, 471 U.S. at 755).

Thus, in *Livadas v. Bradshaw, supra*, 512 U.S. 107, this Court held that the California Labor Commissioner's policy of refusing to process the wage claims of union workers, while processing the wage claims of non-union workers, was unlawful under federal law precisely because the California Labor Commissioner treated union workers differently than nonunion workers. It is true, as the court below obviously concluded, that this Court specifically recognized the validity of certain "familiar and narrowly drawn opt-out provisions" in state minimum labor standard statutes which allowed union workers to be treated somewhat differently by allowing their unions to bargain for a different labor standard. *Livadas*, 512 U.S. at 132. Thus, the question arises as to whether a state statute or regulation which requires the interpretation of a collective bargaining agreement could constitute such "narrowly drawn opt-out provisions" recognized as valid in *Livadas*.

Under a Maine severance statute containing an opt-out provision and discussed in *Livadas*, employers were required to provide laid-off employees with certain minimum severance benefits. However, all Maine employees (*both* union *and* nonunion alike) could expressly agree on different severance terms. *Livadas*, 512 U.S. at 130-31. Given this fact, the Court noted that, in *Fort Halifax Packing Co., supra*, it had rejected a federal attack on the Maine statute for two reasons. "Most fundamentally, the Maine law treated all employees equally, whether or not represented by a labor organization." *Id.*, 512 U.S. at 131. "Second, the minimum protections of Maine's plant closing law were relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement), but only by the parties' express agreement on different terms." *Id.*

Simply put, to be a valid opt-out provision,"union-represented employees [must] have the full protection of the minimum standard, absent any agreement for something different." *Livadas, supra*, 512 U.S. at 131. Moreover, the "agreement for something different" must be more than "the mere act of signing an employment contract"; it must be "the parties' express agreement on different terms." *Id.* Here, the Ninth Circuit held that, if a collective bargaining agreement must be interpreted to determine whether the parties actually entered into an "express agreement on different terms," Section 301 preemption requires that a union member's claim for violation of the minimum labor standard must be pre-empted without ever finding out if his or her union actually opted out of the standard. Given that any provision purporting to waive a state minimum labor standard must be "clear and unmistakable" for a court to even consider giving it effect, *Livadas*, 512 U.S. at 125, Petitioners respectfully submit that, if an opt-out provision actually requires interpretation (and thus is not clear and unmistakable), the default should be in granting "union-represented employees . . . the full protection of the minimum standard," *id.* at 131, *not* in having their claims held to be extinguished through preemption.

II. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THE CALIFORNIA COURT OF APPEAL.

Petitioners readily concede that this Court generally grants certiorari to resolve conflicts among the federal courts of appeals, not between a federal court of appeals and a state court of appeal. Here, however, the Court is presented with a unique situation.

First, although the parties to this case and to *Millan v. Southern California Gas Co., supra*, are not identical, the defendant is the same. The only difference between the two cases is that Petitioners' proposed class was never certified,

while the State of California was able to sue on behalf of all of Petitioners' coworkers without a certified class. Second, the two cases arose under the same facts, involving the same collective bargaining agreement and the same overtime provisions. And finally, the Ninth Circuit and the California Court of Appeal reached diametrically opposed conclusions.

Clearly, some Supreme Court should resolve the conflict; the only real issue is should it be the California Supreme Court or this Court. Given the important mistakes made by the Ninth Circuit on issues of federal law outlined above, Petitioners respectfully submit that it should be this Court.

III. THE COURT SHOULD DECIDE THE IMPORTANT ISSUE LEFT UNRESOLVED BY *LIVADAS*.

Before addressing this issue, Petitioners first note that there are two types of state-law claims that may be preempted by Section 301. *See Livadas*, 512 U.S. at 124 n.18. First, there is the claim that is based upon a right or duty created by a collective bargaining agreement. *See, e.g., International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (holding preempted a state-law tort action based upon a contractual duty arguably created by a collective bargaining agreement). Petitioners will refer to this type of Section 301 preemption as "*Hechler* Preemption." The second type of case that may be preempted is where the right or duty is actually created by state law, but its enforcement is "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Petitioners will refer to this second type of Section 301 preemption as "*Allis-Chalmers* Preemption."

Both forms of Section 301 preemption find their basis in Congress's intention that issues relating to the interpretation of a collective bargaining agreement be judged only in accordance with federal labor law. *Local 174, Teamsters v.*

Lucas Flour Co., 369 U.S. 95, 103-04 (1962); *see also United Steelworkers of America v. Rawson*, 495 U.S. 362, 368 (1990) ("State law is . . . 'preempted' by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation or application of collective bargaining agreements"). Given that "arbitrators are in a better position than courts *to interpret the terms of a CBA*." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 78 (1998) (emphasis in original), it is not surprising that implicit in Section 301 preemption is preserving for the labor arbitrator the interpretation of collective bargaining agreements. *Livadas*, 512 U.S. at 121-22.

With respect to *Hechler* Preemption, Petitioners, who are union members, have no problem with the concept that not only are "arbitrators in a better position than courts to interpret the terms" of their collective bargaining agreement, the parties bargained for the arbitrator's remedy of any violation of its terms, *not* that of some state court jury. *See Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 211. Thus, Petitioners have no problem with the idea that Section 301 actually extinguishes any state-law claim to enforce an obligation created by a collective bargaining agreement. *International Brotherhood of Electrical Workers v. Hechler, supra*, 481 U.S. at 860-62

With respect to *Allis-Chalmers* Preemption, however, Petitioners do have a problem with having their claims preempted, at least in the manner in which the Ninth Circuit has done so. To begin with, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court specifically recognized that a labor arbitrator has very limited jurisdiction:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. *His source of authority is the collective-bargaining agreement*, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the

various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws* that conflict with the bargain between the parties:

"An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, *the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. Ibid.* Thus *the arbitrator has authority to resolve only questions of contractual rights*, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (emphasis added).

Simply put, among other things, *Gardner-Denver* stands for the basic proposition that a labor arbitrator lacks the authority to adjudicate Petitioners' state-law overtime claims, even if a labor arbitrator is required to interpret the phases "regular rate" and "premium wage rate." But given the Ninth Circuit's decision, Petitioners also cannot bring these claims before the state court. For all intents and purposes, Petitioners' claims have been *completely extinguished* by the Ninth Circuit.

In *Livadas*, this Court recognized that: "Holding the plaintiff's cause of action substantively extinguished may not

. . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." *Livadas*, 512 U.S. at 124 n.18. This Court should grant certiorari to determine whether there are other acceptable means available, such as staying the action pending arbitration of any issue relating to the interpretation of a collective bargaining agreement. *See Livadas v. Bradshaw*, 865 F. Supp. 642, 645-46 (N.D. Cal. 1994) (on remand from Supreme Court, Labor Commissioner adopts policy of staying administrative proceedings pending arbitration of disputed terms of collective bargaining agreement). Indeed, one has to wonder whether there is any need to vindicate the arbitrator's primacy if the collective bargaining agreement is one of the rare ones which do not contain an arbitration clause.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 12, 2002]

No. 97-56055

SAMUEL FIRESTONE; CALVIN MIYASHIRO; JACK PUTNAM; BRIAN FRAZEN, individually and on behalf of all other present and former employees similarly situated,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Defendant-Appellant.

Before:

SCHROEDER, BEEZER, and GRABER, *Circuit Judges*.

OPINION

SCHROEDER, *Circuit Judge*:

The plaintiffs have filed a Petition for Rehearing and Suggestion for Rehearing En Banc contending that our court's intervening en banc decision in *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001) (en banc), *cert. denied*, 2002 WL 13239 (U.S. Jan. 7, 2002) (No. 01-432), requires us to hold that the plaintiffs have stated a state law claim for overtime pay. In *Cramer* we clarified our decisions with respect to preemption, an area that has become increasingly confusing in recent years. In *Cramer*, we overruled our cases that had held state law claims preempted where the state right in question was not the subject of any actual collective bargaining agreement provision, but was "'a

properly negotiable subject for purposes of collective bargaining.'" *Id.* at 692-93 (quoting *Util. Workers of Am. v. S. Cal. Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988)). We held that those cases applied preemption too broadly.

In *Cramer*, however, we reaffirmed the principle that a state law claim is preempted if it necessarily requires the court to interpret an existing provision of a collective bargaining agreement ("CBA") that "can reasonably be said to be relevant to the resolution of the dispute." *Cramer*, 255 F.3d at 693. A claim that requires only reference to the collective bargaining agreement, but no interpretation, is not preempted. *Id.* at 690 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-13 (1988)).

In our original opinion in this case, we held that resolution of plaintiffs' state law overtime claim would require interpretation of the agreement, because plaintiffs are not entitled to any overtime under state law if they are paid a "premium" for overtime work above the "regular rate" of pay in the contract. *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000). The parties in this case disagree about which rate in the contract is the "regular" rate and, thus, disagree on whether plaintiffs are receiving a "premium" for overtime work. Resolving this question, we held, requires interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accepted.

We conclude that *Cramer* does not change this result. Resolution of plaintiffs' claim to overtime pay under state law cannot be decided by mere reference to unambiguous terms of the agreement. We are in agreement with a recent decision of the First Circuit, where the court noted:

> In many cases, however, the state law claims are "inextricably intertwined" with the meaning of terms in the CBA and are thus preempted by federal labor law.

> *Allis-Chalmers [Corp v. Lueck*, 471 U.S. 202, 213 (1985)]. In such instances, state law "must yield to the developing federal common law, lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions." *Livadas [v. Bradshaw,* 512 U.S. 107, 122 (1994)].

Adames v. Executive Airlines, Inc., 258 F.3d 7, 12 (1st Cir. 2001).

The panel as constituted above has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc and Judge Beezer has so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing and the petition for rehearing en banc are therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 19, 2000]

No. 97-56055

SAMUEL FIRESTONE; CALVIN MIYASHIRO; JACK PUTNAM; BRIAN FRAZEN, individually and on behalf of all other present and former employees similarly situated,
Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant-Appellant.

Argued Oct. 4, 1999

Before:

SCHROEDER, BEEZER, and GRABER, *Circuit Judges*.

OPINION

SCHROEDER, *Circuit Judge*:

This is a suit for overtime compensation under both federal and California fair labor provisions. The most significant issue on appeal is whether plaintiffs' state law claim for time-and-a-half of their regular hourly rate for all hours worked beyond eight in a day and forty in a week is preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a). On the merits, the employer argues that the claim is foreclosed by an exemption in the

California overtime law for employees who are covered by a collective bargaining agreement that provides, in relevant part, for "premium wage rates" for overtime work. The district court held that plaintiffs' claim was preempted by the LMRA because resolution of the essential dispute between the parties about the applicability of the California exemption required interpretation of the complex pay and overtime pay provisions in the collective bargaining agreement. The district court dismissed on the merits plaintiffs' claim under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* We affirm these rulings.

The Law of Preemption Under § 301

Section 301 of the LMRA provides in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. § 185(a). The Supreme Court ruled long ago that the legislative history of § 301 makes clear that Congress intended to have the federal courts create a body of federal common law to be used to adjudicate disputes arising out of labor contracts. *See Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (punctuation omitted). A court's determination of whether a state law claim is preempted by § 301 "must focus . . . on whether [the state law claim] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract,

or, instead, whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). Of course, not every dispute involving provisions of a collective bargaining agreement is preempted by the LMRA. *See id.* at 211, 105 S.Ct. 1904. When the meaning of particular contract terms is not disputed, the fact that a collective bargaining agreement must be consulted for information will not result in § 301 preemption. *See Livadas v. Bradshaw,* 512 U.S. 107, 123-24, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) (citing *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 413 n. 12, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988)); *see also Audette v. International Longshoremen's and Warehousemen's Union,* 195 F.3d 1107, 1113 (9th Cir.1999). However, § 301 does preempt state law claims that are "substantially dependent" on an analysis of a collective bargaining agreement. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

The Parties' Overtime Arrangement

In 1995, the plaintiffs' unions and the employer, Southern California Gas Company (SCGC), agreed to a compensation arrangement set forth in a document entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes" (PPR document). Under the Pay-Per-Route system, all meter readers were paid flat sums for completing meter reading routes of assigned lengths, even if it took less than the estimated time to complete the routes. The flat sum for each route was calculated by multiplying the hourly rate set forth in the collective bargaining agreement ($16.56 per hour) by the amount of time it was expected to take to complete the route.

Meter readers who worked more than 8 hours in one day received an adjustment to the flat sum normally paid. The method of calculating compensation for these hours is the

subject of some dispute by the parties. According to the PPR document itself, the unassigned overtime hours posted were computed as follows: (assigned hours/actual hours) X .3334 X (actual hours-8). That figure was then multiplied by one and one-half the hourly rate set forth in the collective bargaining agreement and added to the flat rate for the assigned hours. SCGC contends that the total pay for a meter reader who worked unassigned overtime was actually calculated by dividing the flat sum by the total number of hours it actually took to complete the route to arrive at the employee's "regular rate" for that day. The meter reader would then receive one and one-half times that regular rate for hours worked beyond 8 per day, added to 8 times the"regular rate" for that day. The difference between the formula contained in the PPR document and that allegedly used by SCGC apparently resulted from the inability of SCGC's computerized payroll system to handle variable rates of pay. These formulae yield almost the same result, however, plaintiffs contend that under either one the defendant violates state wage and hour laws by failing to provide a "premium" wage rate for overtime work.

Discussion

The applicable California statute on overtime provides: "No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1-1/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek." 8 Cal.Code Reg. § 11040(3)(A). An overtime exemption provision provides that the section quoted above "shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." 8 Cal.Code Reg. § 11040(3)(D).

The district court held that one could not determine whether plaintiffs were receiving a "premium wage rate" for overtime under the collective bargaining agreement-making them exempt from California overtime laws-without interpreting that agreement to determine, *inter alia*, what the regular rate was. For the following reasons, we agree with the district court that resolution of this issue requires interpretation of the agreement, and that the state law overtime claim is therefore preempted.

According to plaintiffs, they are not paid a "premium rate" because the rate they ultimately receive for overtime hours is lower than the standard rate of $16.56 per hour used to calculate the flat rate for each route. Thus, argue plaintiffs, they actually receive lower wages for overtime hours than they receive for scheduled hours. On the other hand, because the employer perceives the "regular rate" to be the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day, the employer maintains that plaintiffs are paid a rate for overtime work that includes a "premium" equal to 50% of the regular rate for that day.

The parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law. To resolve that dispute, it would be necessary to apply California law to determine the overtime rights and obligations of the parties to the agreement. The claim is not "independent" of the collective bargaining agreement under federal preemption law. *See Lingle,* 486 U.S. at 407, 108 S.Ct. 1877.

The Court in *Lingle* held that a state law claim of retaliatory discharge for exercising state Workers' Compensation rights was not preempted, because the dispute did not turn on the meaning of any terms in the collective bargaining agreement. It was irrelevant that a grievance could also have been filed and arbitrated pursuant to that agreement. The right

to be free of retaliatory discharge for filing a claim under the state Workers Compensation laws existed independent of the collective bargaining agreement.

In *International Broth. of Elec. Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987), on the other hand, a claim under state law for breach of the duty to provide a safe workplace was preempted because the defendant's duty was defined by reference to the collective bargaining agreement. There was no duty independent of the collective bargaining agreement. The Court pointed out that if state law "were allowed to determine the meaning of particular contract phrases or terms in a collective bargaining agreement . . . the 'parties would be uncertain as to what they were binding themselves to' in a collective-bargaining agreement, and, as a result, 'it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.'" *Id.* at 858, 107 S.Ct. 2161 (quoting *Allis Chalmers,* 471 U.S. at 211, 105 S.Ct. 1904).

This case illustrates that problem well, for if California law were to apply, the parties negotiating the agreement would not know whether the employer's overtime obligations were defined by the contract or not, depending on which rate a court determined was the "regular" rate under the California law. The claim is preempted.

Plaintiffs rely on *Livadas v. Bradshaw*, 512 U.S. 107, 123-24, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). In that case, the Supreme Court held that a claim based on a state requirement for timely payment of severance pay was not preempted, because resolving the claim did not require any interpretation of the collective bargaining agreement; it required instead reference only to a calendar and the undisputed wage rate. *See* 512 U.S. at 121-25, 114 S.Ct. 2068. There were no terms in the statute to be interpreted with reference to the collective bargaining agreement, nor were there any terms of the collective bargaining agreement

to be interpreted in light of the statute. That is not so here. Because the collective bargaining agreement must be interpreted to determine whether the PPR document provides for premium wage rates for overtime work and, therefore, whether California's overtime exemption provision applies, *Livadas* is inapposite. Plaintiffs' state law claim is preempted by the LMRA.

In the alternative, plaintiffs maintain that the California premium rate exemption is itself preempted by federal law, because the exemption denies union employees benefits extended to non-union employees. Again, plaintiffs' reliance on *Livadas* is misplaced. In *Livadas,* the Court considered a state's policy of refusing to enforce the severance pay provisions as to all employees covered by collective bargaining agreements with arbitration clauses. The Court held that the policy was contrary to federal labor law because it burdened all employees who were subject to the collective bargaining and arbitration processes that federal law recognizes as significant. *See id.* at 117-18, 114 S.Ct. 2068. By contrast, the exemption from California's mandatory time-and-a-half overtime requirement is limited to those employees covered by collective bargaining agreements containing negotiated premium wage rates that are over and above regular wage rates in excess of the minimum wage. The exemption therefore applies only to those who have sought and received alternative wage protections through the collective bargaining process. The California statute as a whole thus "provides protections to individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)).

The Supreme Court in *Livadas* recognized that opt-out provisions for negotiated alternatives to state-law standards are not in conflict with federal preemption law. These "familiar and narrowly drawn opt-out provisions" exempt employees covered by a collective bargaining agreement that contains a negotiated provision on the same subject but different from the statutory provision. *See Livadas,* 512 U.S. at 131-32, 114 S.Ct. 2068 (citing D.C.Code § 36-103 ("Unless otherwise specified in a collective agreement . . . [w]henever an employer discharges an employee, the employer shall pay the employee's wages earned not later than the working day following such discharge."); 29 U.S.C. § 203(o) ("Hours [w]orked" for Fair Labor Standards Act measured according to "express terms of . . . or practice under bona fide collective-bargaining agreement")); *see also Viceroy Gold v. Aubry,* 75 F.3d 482, 489-90 (9th Cir.1996) (holding that a California provision exempting from the maximum hour laws employees covered by a "valid collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions of the employees" is not preempted by the NLRA).

Such an opt-out is essentially what California has adopted here. California's overtime exemption provision does not operate automatically to exempt virtually all union-represented employees from its coverage-it exempts only those who have bargained for an alternative overtime compensation scheme. We recognized as much in *National Broadcasting v. Bradshaw,* 70 F.3d 69, 73 (9th Cir.1995), which stated that an identical California overtime exemption was an opt-out provision not preempted under *Livadas.* Accordingly, California's overtime exemption provision is not preempted by federal labor law.

Plaintiffs also challenge the district court's dismissal of their claim for overtime pay pursuant to the FLSA. Section 207(a)(1) of the FLSA provides in part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Plaintiffs assert that defendant's practice of determining on a daily basis the rate upon which overtime compensation is based violates § 207(a)(1). According to the regulations, however, an employee's "regular rate" may be calculated on the basis of an employee's average earnings over one of any number of periods, including a day. *See* 29 C.F.R. § 548.3(b). Plaintiffs nonetheless argue that because the basic rate arrived at by defendant under the PPR document can "fluctuate wildly," SCGC's utilization of a daily rate cannot comply with 29 C.F.R. § 548.2(e), which plaintiffs claim mandates that an employee's basic rate will be "substantially equivalent" to the average earnings of the employee "over a representative period of time." The full provision states that the basic rate established by the employer must be "authorized by § 548.3 or . . . authorized by the Administrator under § 548.4 as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time." 29 C.F.R. § 548.2(e). What is therefore required by § 548.2(e) is that the basic rate used be either one permitted under § 548.3 or one specially authorized by the Administrator of the Wage and Hour Division of the Department of Labor pursuant to 29 C.F.R. § 548.4. Here, defendant's method of calculating a

regular rate upon which to base overtime compensation is specifically authorized by 29 C.F.R. § 548.3(b). Accordingly, it does not violate the FLSA.

Finally, plaintiffs contend that the district court erred by dismissing the federal and state law claims related to nondiscretionary bonuses which they raised for the first time in the first amended complaint. It is unclear from the record whether the district court inadvertently dismissed those claims without considering them. Accordingly, a remand is appropriate for proper consideration of these claims.

Costs on appeal are awarded to SCGC.

AFFIRMED IN PART AND REMANDED IN PART.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed July 14, 1998]

No.

SAMUEL FIRESTONE; CALVIN MIYASHIRO;
JACK PUTNAM; and BRIAN FRAZEN,
Plaintiffs,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I.

Introduction

In this action, plaintiffs, gas meter readers, seek class-wide relief from their employer, the Southern California Gas Company ("the Gas Company"), on the basis that the Gas Company's method of computing overtime pay and failure to schedule rest breaks violates state and federal wage and hour laws. Under the system at issue, gas meter readers were paid for the hours they were assigned to work rather than hours actually worked. Plaintiffs' First Amended Complaint alleges violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, for failure to pay time and one half for all hours worked in excess of forty per week, and violation of § 3(A) of Wage Order 4, Cal. Code Regs. tit. 8 § 11040, by failing to pay an overtime premium of one and one-half for all hours worked in

excess of forty hours per week and eight hours per day and for failing to permit rest breaks as required by Cal. Code Regs. tit. 8 § 11040. Plaintiffs seek compensatory damages, injunctive and declaratory relief.

Defendant's motion to dismiss the state overtime claim based on federal preemption of plaintiff's state law claim under § 301 of the Labor Management Relations Act ("LMRA") was argued December 15, 1997. Because the plaintiffs submitted declarations and documents that could not be properly considered on a motion to dismiss, the Court elected to treat defendant's motion as a motion for summary judgment under Fed. R. Civ. P. 56. The Court then allowed plaintiffs sixty days to conduct discovery on relevant factual issues, and ordered supplemental briefing.

The Court now concludes that plaintiffs' state law overtime claim is indeed preempted by § 301 of the LMRA. Plaintiffs are unable to state a claim under the LMRA because they failed to arbitrate this dispute as required by the collective bargaining agreements between the Utility Workers of America and the International Chemical Workers Union Council of the UFCW, AFL-CIO and the Gas Company. Furthermore, defendant is entitled to summary adjudication of plaintiffs' federal claim because there exist no genuine issues of material fact and defendant is entitled to judgment as a matter of law. With the resolution of plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over the remaining state law claim based on defendant's alleged failure to provide rest breaks. Accordingly, defendant's motion for summary judgment is GRANTED as to the first and second claims for relief. The third claim for relief is DISMISSED without prejudice.

II.

Factual Background

Plaintiffs are members of a bargaining unit jointly represented by the Utility Workers of America, AFL-CIO, and by the International Chemical Workers Union Council of the UFCW, AFL-CIO (collectively, "the Unions"). The named plaintiffs in this action are represented by the Utility Workers.

The Gas Company and the Unions are parties to a series of collective bargaining agreements ("CBAs") establishing the wages, hours, and other terms and conditions of employment. The most recent CBA was effective from September 9, 1996 through March 31, 1998 ("the 1996 Agreement"). *See* Exh. 1 to Declaration of Alejandro Ahumada. The prior CBA was effective March 9, 1994 to March 31, 1996 ("the 1994 Agreement"). *See* Exh. 2 to Ahumada Declaration. Between April 1, 1996 and September 8, 1996, while the Unions and the Gas Company were negotiating a new contract, plaintiffs were not covered by a collective bargaining agreement. Declaration of Samuel Firestone Declaration, ¶ 6.

Part of the 1994 Agreement—a March 9, 1994 Letter of Agreement re: "Competitive Benchmarking of Functions"—gave the Gas Company the right to contract out the work of meter reading, but reserved for the Unions the right to match the savings generated by contracting out work to the lowest qualified contractor. *See* Exh. 1 to Ahumada Declaration at 210-215. The Gas Company, however, agreed not to contract out the work and to continue to employ meter readers if the Unions could match the savings, a process known as "competitive bench marking."

On March 29, 1995, the Gas Company and the Unions agreed through collective bargaining to change the way the Gas Company's meter readers performed their duties and agreed to change the method by which meter readers were

compensated. These changes were set forth in a document entitled "Pay-Per-Route ("PPR"] for Meter Reading and Meter Reading A/B Routes" ("PPR Document"). *See* Exh. A to Firestone Declaration. Under the PPR system, as of April 5, 1995, meter readers were no longer paid by the hour. Instead, all meter readers were paid a flat sum for performing an assigned meter reading route regardless of the actual time it took to complete the route. The value assigned to a route was calculated by multiplying the contractual hourly pay rate for a Pay Grade 3, $16.56 per hour, by the amount of time it was determined it would take to complete the route.[1] The PPR system was implemented "to help achieve cost savings in Meter Reading. Pay per route simply means that meter readers will be paid for hours assigned, not actual hours . . . ." Exh. A to Firestone Declaration, PPR Document at 4.

There are two types of routes—A and B. A Routes were predetermined to take eight hours to complete and were valued at $132.48 ($16.56 x 8 hours). B Routes were predetermined to take 6.75 hours to complete, and were paid a lower flat rate of $111.78 ($16.56 x 6.75 hours).

The "Calculating Overtime" section of the PPR Document provides "if assigned or actual hours exceed 8 hours in a single day, some form of overtime premium will be paid." PPR Document at 9. If a meter reader were to work more than eight hours in one day, the flat sum paid would be adjusted to reflect either "assigned" or "unassigned" overtime. Assigned overtime was work over eight hours that was necessary for completing a longer or more complicated route. Unassigned

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[1] "Route value is calculated according to industrial engineering concepts by determining, among other factors, the number of meters in a given route, geographical and topographical factors, the locations of the meters, and the speed in which a meter reader can walk at a fair pace. To this, time is added for preparatory and concluding activities at the base and 7.25% fatigue allowance, which calculates to thirty-five minutes over eight hours." Declaration of Mark L. Serrano, ¶ 9.

overtime was extra time required for slower meter readers, where there were excessive customer contacts, where there was unusually heavy traffic, where there were dogs in customers' yards, and other distractions that might delay timely completion of the route. If the extra hours were assigned, the meter reader would be paid at a rate of one and one half times the hourly rates for meter readers set forth in the 1994 and 1996 Agreements. According to plaintiffs, if the work in excess of eight hours were unassigned (a meter reader took longer than the eight hours he was supposed to take to complete the A Route or took more than one and one-quarter hours longer than the 6.75 hours fixed for B Routes), the following formula applied: (assigned hours ÷ actual hours) x 0.3334 x (actual hours - 8) = overtime hours posted. This is the formula in the PPR Document. The .3334 factor is calculated by dividing 1.5 (overtime rate is time and one half) into .5—.5 ÷ 1.5 (the premium over straight time). The justification for this formula is that an overtime hour is compensated by .5x "straight time" and overtime hours and paid at 1.5x straight time. PPR Document at 10. Using this formula, a meter reader assigned an eight hour route who actually worked ten hours was paid for .5 overtime hours ((8 ÷ 10) x .3334 x (10 - 8) = .53344 or ½ hour overtime), not two hours. *See* Appendix A to PPR Document.

According to the Gas Company, this formula is not compatible with its automated payroll system. Instead, unassigned overtime is calculated according to the following formula: The regular rate of pay is computed by dividing the number of hours actually worked into the fixed value of the route. Then this hourly rate is used to compute overtime at 50% of the employer's regular rate. The longer a meter reader takes to complete the route, the smaller his or her hourly rate on which the time and one half is based. The only difference between the formula in the PPR Document and this one is that the PPR formula is set in terms of payroll hours. The two

formulas yield the same result. Under the Gas Company's reported method, a meter reader who took ten hours to complete an eight hour A route would be paid $132.48 ÷ 10 = $13.25 per hour, and 50% of that would be $6.62, yielding an overtime hourly rate of $19.87. The total amount paid would be ($13.25 X 8 straight hours) + ($19.87 X 2 overtime hours) = $145.74.

The formula actually used by the Gas Company is the only factual issue in dispute,[2] and it is does not rise to the level of a genuine issue of material fact because the result is the same using either formula.

The Unions did not sign the agreement regarding the method of compensation for meter readers set forth in the PPR Document signed by the Gas Company February 13, 1996, because they believed the system was unfair and possibly illegal. *See* Ahumada Declaration, ¶¶ 7-8 and Exh. 4.

The Gas Company reports that its studies, which have not been filed with the Court, show that meter readers work an average of seven hours three minutes per day plus thirty-five minutes compensated rest time and that 84% of A Route meter readers complete their work in less than eight hours per day. Plaintiff Samuel Firestone counters that routes assigned ten and one-half hours to complete in July 1994 became eight hour routes in April 1995 when the PPR system was

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[2] Defendant points out in its Reply that the Court gave plaintiffs until February 27, 1998 to conduct discovery on how overtime wages were calculated and plaintiffs elected not to engage in further discovery. Furthermore, defendant states although it furnished plaintiffs with the payroll records for the named plaintiffs during the relevant time period, plaintiffs made no use of this information. "As such, plaintiffs assertion (at p. 4) that the PPR formula 'is not *really* the formula' that The Gas Company uses to calculate unassigned overtime is purely speculation, and further, this assertion is erroneous." Reply at 1. Defendant's point is well-taken, and plaintiffs' failure to take advantage of additional discovery cannot elevate this issue to a genuine issue of disputed material fact.

implemented. Firestone Declaration, ¶ 20. The Gas Company responds that the Unions had to make concessions that increased productivity and lowered the meter readers' pay to avoid losing their jobs altogether.

Plaintiffs argue that the PPR formula resulted in a "negative premium" and disincentive for unassigned overtime because meter readers are paid for overtime at a rate less than their regular rate of pay. *See* Ahumada Declaration, ¶ 6. Thus Local 132 of the Utility Workers' Union and its members filed several grievances protesting the implementation of the PPR system, which culminated in a facilitation proceeding held in February 1998. This grievance resulted in the elimination of the position of full-time meter readers. Ahumada Declaration, ¶ 8. A number of Local 132 members (including several of the plaintiffs) asserted that. it was impossible for meter readers to complete their assigned routes within the assigned time. These members determined that they would be unlikely to prevail in an arbitration challenging the PPR system because the arbitrator would likely conclude the PPR system did not violate the CBAs because it was implemented under the authority of the benchmarking agreement that had been agreed to through collective bargaining. "We concluded that SCGC effectively had the power under the Benchmarking Agreement either to impose the terms it wanted or to contract out meter reading." Ahumada Declaration, ¶ 9. The members ultimately failed to complete the grievance process.

The benchmarking process has since been eliminated. Ahumada Declaration, ¶ 9.

III.

Discussion

A. Standard for Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment if "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment "terminates the action without trial" and is a "judgment 'on the merits.'" Schwarzer, Tashima, and Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial § 14:28 (The Rutter Group 1996) (hereinafter Schwarzer). Not only is summary judgment not "disfavored," but it is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corporation v. Catrett,* 477 U.S. 317, 327 (1986).

In a trilogy of 1986 cases, the Supreme Court clarified the standard for summary judgment. *See Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby. Inc,* 477 U.S. 242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson,* 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other Party's case. *See Celotex,* 477 U.S. at 325; *see also* Schwarzer §§ 14:123-141.

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response,

by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient. 2Ld... at 252. As the Court explained in *Matsushita*, 475 U.S. at 586-87:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

The rules of evidence generally govern the admissibility of facts. Schwarzer, § 14:160 (citing *Hal Roach Studios, Inc. v. Feiner & Co. Inc.,* 892 F.2d 1542, 1555 (9th Cir. 1930)). Rule 56(e) requires that declarations or affidavits submitted in support of or in opposition to a summary judgment motion "be based on personal knowledge; state 'facts as would be admissible in evidence' . . . ; and 'show affirmatively that the affiant is competent to testify to the matters stated therein[.]'" *Id.,* § 14:162. Declarations on information and belief are insufficient. *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989).

B. Federal Preemption under § 301 of the LMRA

1. Standard

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court having jurisdiction of the parties[.]" 29 U.S.C. § 185(a) (emphasis added). The purpose of such broad preemptive power is to prevent state courts from purporting to rule on the legal consequences intended to flow from the breach of a collective bargaining agreement, and to prevent parties from reneging on arbitration promises in a collective bargaining agreement, by "relabeling" breach of contract claims as tort claims. *Livadas v. Bradshaw,* 512 U.S. 107, 124 (1994) . Section 301 has thus been interpreted "as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209 (1985), explaining *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). The need to establish a single body of federal labor law has been found by the courts to be compelling. "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

Section 301 has been broadly construed to cover most state claims that require interpretation of collective bargaining agreements. *Builders & Contractors, Inc. v. International Brotherhood of Electrical Workers,* 109 F.3d 1353, 1356 (9tj Cir. 1997). The preemptive force of the LMRA displaces any state law causes of action that require interpretation of, and are not independent of, a collective bargaining agreement. Schwarzer, Tashima, and Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial § 2:722 (The Rutter Group 1997) (hereinafter Schwarzer); *see also Franchise Tax Board v.*

Construction Laborers Vacation Trust, 463 U.S. 1. 23-24 (1983), *superseded by statute on other grounds as stated in Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988). State law is preempted by the LMRA only if the court must interpret, rather than merely refer to or examine, the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 413 (1988); see also Schwarzer § 2:736. In other words, preemption is only proper if a state law claim is "substantially dependent on analysis of a collective bargaining agreement." *Id.,* citing *Allis-Chalmers*, 471 U.S. at 220. The Supreme Court instructs, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas,* 512 U.S. at 124. Indeed, "'purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective bargaining agreement.'" *Hawaiian Airlines, Inc v. Norris,* 512 U.S. 246, 261 (1994)

Moreover, as the Supreme Court clarified in *Livadas,* "§ 301 does not disable state courts from interpreting the terms of collective bargaining agreements in resolving non-preempted claims." *Livadas*, 512 U.S. at 124 n.17.[3] State law claims are not broadly preempted if they are based on an employee's exercise of an independent or "non-negotiable," right protected by state law or public policy. Id. A nonnegotiable right cannot be bartered away through collective bargaining. Thus, "where a plaintiff contends than an employer's actions violated a state-law obligation, wholly

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[3] The Supreme Court had previously noted that it "is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of the collective-bargaining agreement for its application. Such a remedy would be preempted by § 301." *Lingle*, 486 U.S. at 407 n.7.

independent of its obligations under the CBA, there is no preemption." *Espinal v. Northwest Airlines,* 90 F.3d 1452, 1456 (9th Cir. 1996) (following *Lingle* and applying LMRA preemption test to Railway Labor Act preemption). The test is whether the evaluation of the state claim is "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers,* 471 U.S. at 213.

Courts must determine whether the state law provision confers non-negotiable rights on employers or employees independent of any right established by contract or the evaluation of the claim is inextricably intertwined with terms of a labor contract. *Allis-Chalmers,* 471 U.S. 219-20. Analysis of federal preemption "turns on the actual content of respondent's policy and its real effect on federal rights." *Livadas,* 512 U.S. at 119.

2. Application

Plaintiffs' original complaint alleged that "a dispute exists between [the Gas Company] and the Unions whether the unlawful payroll practices described herein are authorized under such Collective Bargaining Agreement." Complaint, ¶ 9. Plaintiffs' First Amended Complaint, filed March 20, 1998, makes no such allegation, and plaintiffs stress that there is no dispute over what the Unions agreed to—they seek only a determination of whether the PPR system violated state and federal wage and hour laws.

Section 3(A) of Wage Order 4, Cal. Code Regs. tit. 8 § 11340 ("Wage Order 4"), provides that an employee may not be employee more than forty hours per week or more than eight hours per day unless the employee is paid at a premium rate equal to one and one-half times such employee's regular rate for all hours worked in excess of forty per week or eight per day. *See* Exh. 1 to Plaintiffs' Opposition at 456. Section 3(G), the Overtime Exemption Provision ("OEP"), exempts from these overtime provisions

any employee "covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." *Id.*

Plaintiffs argue the OEP is preempted by federal law because the provision penalizes union workers by withdrawing minimum standards because of union representation. The Court orally rejected this argument at the December 15, 1997 hearing. The Supreme Court has explained, "These 'opt-out' statutes are thus manifestly different in their operation (and the effect on federal rights) from the Commissioner rule that an employee forfeits his state law rights the moment a collective bargaining agreement with an arbitration clause is entered into. Hence, our holding that the Commissioner's unusual policy is irreconcilable with the structure and purposes of the Act should cast no shadow on the validity of these familiar and narrowly drawn opt-out provisions." *Livadas*, 512 U.S. at 131-32 (internal citations omitted). The NINTH Circuit rejected the argument that an exemption identical to 3(G) was invalid under *Livadas*, citing the same language. *See National Broadcasting Co. v Bradshaw*, 70 F.3d 69, 73 (9th Cir. 1995).

Plaintiffs also contend that a valid opt-out provision did not exist between April 1, 1996 and September 8, 1996 when no CBA was in effect. However, the 1994 Agreement covered this time period because when a CBA expires, the agreement remains in effect until a new one is reached. In *National Broadcasting*, the NINTH Circuit quoted a letter from the California Labor Commissioner that explained,

> [T]he division has a long-established policy that provides that the mere expiration of a collective bargaining agreement will not operate to remove the worker from coverage by the collective bargaining agreement. Absent some other unilateral action by the

> parties to the expired CBA, the terms and conditions of the agreement (except for arbitration and union recognition) continue.

70 F.3d at 71. In that case, the court found that an OEP did not apply during the period between a declared bargaining impasse and the effective date of the new CBA. The pre-impasse period, however, would have been covered by the expired agreement. Here, it is undisputed that during this time period with no effective CBA, the Gas Company continued to negotiate with the Unions and to pay its employees overtime at the same rate it had paid under the expired agreement.

In its motion to dismiss, defendant contends that plaintiffs' state overtime claim is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), because the factfinder must interpret and apply the applicable CBAs to determine how meter readers are paid—whether hourly, salary, piece-rate, or a day-rate; what their "regular rate of pay" is; whether they are paid additional wages for overtime hours and whether such wages constitute a "premium.." Thus an arbitrator should determine whether the Gas Company is paying a "premium" wage for overtime work so that the PPR falls within the OEP of Title 8, California Administrative Code § 11040(3)(G). The Court agrees.

First, Wage Order 4 cannot be said to confer nonnegotiable rights, as those who are a party to a CBA meeting certain minimum requirements are exempt. Thus, these state wage and hour law protections obviously may be bargained away through the collective bargaining process.

More importantly, the meaning of basic wage and hour terms is the subject of dispute and the CBAs govern these terms. The benchmarking letter is part of the 1994 and 1996 CBAs. The OEP does not define "premium" nor "regular rate of pay." Analysis of these terms requires more than merely referring to the CBAs. And whether the OEP applies turns on

the meaning of "premium rate of pay" and "regular rate of pay." While plaintiffs stress that the Court need not interpret any provision of the CBAs because none of their terms are disputed by the parties, this argument misses the point. What the parties think the CBAs mean is of no moment; the parties may have agreed upon an inaccurate interpretation of the CBAs. Significantly, if this matter went to trial, the CBAs would be relevant evidence on plaintiffs' overtime claim. The Court cannot conclude that this claim is independent from the CBAs because the outcome would not necessarily be the same regardless of the CBAs. The Court simply cannot say that California has created rights "wholly apart from any provision of the CBA[s]." *See Hawaiian Airlines*, 512 U.S. at 258. In fact, the Supreme Court has specifically identified claims involving overtime pay as the type of dispute traditionally resolved through arbitration. *See Allis-Chalmers*, 471 U.S. at 219-20.

It is well-settled that federal law governing § 301 claims includes a general requirement that employees exhaust grievance and arbitration procedures before bringing suit. *See Republic Steel Corporation v. Maddox*, 379 U.S. 650, 652 (1965); *Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990). Section 6.8 of the 1996 Agreement sets forth the grievance and arbitration procedure between the Gas Company and the Unions. *See* Exh. A to Declaration of Gerald T. Abbott. Although one plaintiff filed a grievance in 1996 regarding the computation and payment of overtime and the Unions initiated a request to arbitrate in 1997, the arbitration has yet to occur. *See* Abbott Declaration, ¶ 4. Plaintiffs have failed to exhaust their remedies through the grievance and arbitration process contained in the CBAs, and in fact specifically declined to do so because they believed these attempts would be unsuccessful. Therefore, plaintiffs cannot state a claim under the LMRA. Accordingly, defendant is entitled to summary adjudication of this claim.

C. Plaintiffs' Federal Overtime Claim

Section 207(a) (1) of the Fair Labor Standards Act (FLSA) requires that "no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. S 207(a) (1). Plaintiffs assert that the Gas Company violates federal law by calculating the regular rate on a daily basis rather than weekly basis.

The Gas Company has complied with the overtime requirements of the FLSA. Federal regulations permit a regular rate of pay to be calculated using a variety of time periods. "Section 548.3(b) authorizes overtime to be computed on the basis of the employee's average hourly earnings for a period longer or shorter than a workweek. It permits the payment of overtime compensation on the basis of average hourly earnings for a day, a week, two weeks or any period up to 16 calendar days, if the period is established and agreed to with the employee prior to the performance of the work." 29 C.F.R. § 548.302(b). A regular rate is determined by "totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked." 29 C.F.R. § 778.112; *see also* 29 C.F.R. § 778.111 (same for piece rates).

Plaintiffs argue that because a meter reader's base rate may fluctuate between $16.56 and $11.04 depending upon how long it takes to complete the route, this rate cannot be said to be "substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time" as required by 29 C.F.R. § 548.2(e). This interpretation would preclude the applicability of § 548.302(b), which provides for

a flexible approach to computing overtime following the collective bargaining process, as the variable time period for computing overtime is allowable "if the period is established and agreed to with the employee prior to the performance of the work." Defendant's motion for summary adjudication of the federal overtime claim is GRANTED.

Although plaintiffs' state rest break claim arises out of a common nucleus of operative fact, the Court declines to exercise supplemental jurisdiction given the resolution of the state and federal overtime claims. This is particularly appropriate where there is no longer any basis for federal court jurisdiction and neither the parties nor the Court has expended a significant amount of time on this remaining state law claim. The remaining state law claim is DISMISSED without prejudice to plaintiffs' right to re-file this claim in state court.

Conclusion

As plaintiffs concede, there is no dispute over what the Unions and the Gas Company agreed to with respect to he (sic) PPR system. Threatened with the layoff of all of the meter readers, the Unions accepted a system of compensation that lowered the number of hours credited to an employee's unassigned overtime, thus reducing the amount of money the Company would have to pay for unassigned overtime First, plaintiffs' state law overtime claim is preempted by § 301 of the LMRA because resolution of this claim is necessarily dependent upon an interpretation of the relevant provisions of the CBAs. Thus it cannot be said that this cause of action is independent of the CBAs. Moreover, plaintiffs have failed to state a claim for relief under the LMRA because they failed to exhaust the grievance procedure established by the CBAs. Second, with respect to the federal overtime claim, there are no genuine issues of material fact in dispute and defendant is entitled to judgment as a matter of law as the federal regulations permit a flexible approach to computing overtime

reached through collective bargaining. Finally, the Court declines to exercise supplemental jurisdiction over the remain state law rest break claim. Judgment shall be entered dismissing the first and second claims for relief on the merits and dismissing the third claim for relief without prejudice.

IT IS SO ORDERED.

DATED: July 14, 1998

/s/ _____
Richard A. Paez
United States District Judge

APPENDIX D

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
Second Appellate District Division Four

[Filed March 13, 2002]

B148811

JOSE MILLAN, AS LABOR COMMISSIONER OF THE STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Plaintiff and Respondent,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Madeleine Flier, Judge. Reversed and remanded.

Opinion by: Hastings

OPINION:

Summary judgment was granted in favor of respondent, Jose Millan as Labor Commissioner of the State of California Department of Industrial Relations, Division of Labor Standards Enforcement in an action against Southern California Gas Company (hereinafter referred to as Employer).[1] The trial court found that application of a collective bargaining agreement between Employer and its

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[1] The motion was also brought in the name of the People of the State of California, but only the Labor Commissioner is named as a respondent in this appeal.

meter readers resulted in certain of the meter readers being paid less than required for overtime pay pursuant to a California labor regulation, Wage Order 4-89. Judgment was entered against Employer in an amount stipulated by the parties.

Three determinations were essential to the trial court's resolution of the case: (1) that federal law did not preempt application of state law; (2) that it should defer to respondent's method of calculating the equivalent hourly "regular pay" to determine whether the collective bargaining agreement was at odds with Wage Order 4-89, subdivision 3(A); and (3) that the collective bargaining exemption within Wage Order 4-89, subdivision 3(G), was not applicable.

We conclude that the trial court did not err on the issue of preemption or in deferring to respondent's method of calculating the equivalent hourly regular pay referenced in Wage Order 4-89, subdivision (A). But the court did err in its determination that the collective bargaining exemption did not apply to the collective bargaining agreement at issue. Depending on the number of overtime hours worked, application of the formula provided within the collective bargaining agreement may or may not violate the terms of Wage Order 4-89. The matter must therefore be remanded for further proceedings to determine whether in any specific instance the wage order was violated.

BACKGROUND

During the period from April 1995 through April 1998, Employer's gas meter readers were covered under a collective bargaining agreement. Through the collective bargaining process, Employer implemented a new compensation plan for its meter readers in April 1995, known as the "Pay Per Route" (PPR) program. The system in place prior to 1995 compensated the meter readers at a fixed hourly rate. Briefly stated, the PPR provided that meter readers would be paid a

flat daily rate for working routes designed with the expectation they would be finished within an eight hour period. Meter readers who took more than eight hours to finish the routes received overtime compensation for the additional hours according to a formula that divided the flat daily rate by the number of hours actually worked that day. As a result, there was no fixed overtime rate paid for hours worked in excess of eight per day.

The Industrial Welfare Commission (IWC) is the state agency empowered to formulate regulations governing employment in California. Those regulations are known as "wage orders." (Lab. Code, §§ 1173, 1178.5, 1182.) The Division of Labor Standards Enforcement, headed by respondent, Labor Commissioner, is the state agency empowered to enforce California's labor laws, including IWC wage orders. (Lab. Code, §§ 21, 61, 95, 98-98.7, 1193.5.)

The wage order at issue here is 4-89, (Cal. Code Regs., tit. 8, § 11040),[2] which provides in section 3(A): "[E]mployees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday . . . is permissible provided the employee is compensated for such overtime at not less than: [¶] (1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours. . . ."

Subdivision 3(G) provides an exemption to the terms of subdivision 3(A) where an employee is "covered by a collective bargaining agreement if said agreement provides

[2] Section 11040 has been amended several times since 1995.

premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage."

In April 1998, respondent, the State Labor Commissioner, brought an action against Employer, alleging that the formula in the PPR calculating overtime wages constituted a violation of the state's overtime law, and seeking to recover unpaid overtime wages on behalf of the meter readers, as well as waiting time penalties for those wages as provided for by the Labor Code.

Employer asserted two affirmative defenses: (1) that respondent's complaint was preempted by federal labor laws; and (2) the PPR compensation program fell under a special exemption to the state's overtime pay laws because it was covered by a collective bargaining agreement.[3]

On February 9, 1999, Employer brought a motion for summary judgment against respondent based on its two affirmative defenses. The following day, respondent filed a motion for summary adjudication against Employer, requesting an order adjudicating that there was no merit to either of the affirmative defenses and that Employer owed a duty to pay its meter readers in compliance with state law.

Respondent asserted that the formula contained within the collective bargaining agreement is at odds with the method

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[3] On appeal, Employer contends that the action is preempted by the Federal Arbitration Act. This contention was not raised in the trial court in connection with its motion for summary judgment. We assume that Employer is referring to an arbitration clause contained in the collective bargaining agreement, as there is no arbitration clause in the PPR document. Since the issue was not first raised in the trial court and the collective bargaining agreement is not part of the record, we do not address this contention. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 824, 847; *Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.)

respondent was required to use to calculate the hourly equivalent of the "regular rate of pay" referenced in Wage Order 4-89. Respondent divides the fixed daily rate by eight, the maximum number of hours that may be worked per day before overtime pay is required pursuant to Wage Order 4-89. In other words, if the fixed daily rate is $132.48, then the hourly regular rate would equate to $16.56 ($132.48 divided by 8). Using this hourly regular rate, if a meter reader worked 10 hours in one day and completed only the regularly assigned number of routes, he or she should be compensated for those two additional hours of overtime at the rate of $24.84 ($16.56 x 1.5).

On the other hand, Employer contends that the method of determining the equivalent hourly regular rate contained within the collective bargaining agreement is sanctioned by federal law, to which respondent and the courts should defer. Federal regulations provide that the "regular rate" is determined by dividing total earnings per day by total hours worked that same day. (29 C.F.R. § 778.111 and 778.112; accord *Bay Ridge Co. v. Aaron* (1948) 334 U.S. 446, 464.) Utilizing the federal method of calculation in the example above, the hourly regular rate would equate to $13.25 ($132.48 divided by 10). The meter reader would be compensated for the two additional hours of overtime at the rate of $19.87 per hour ($13.25 x 1.5). Under Employer's method, therefore, the regular rate is not fixed; an individual's regular rate can vary daily, and the more overtime hours a meter reader works, the lower his or her regular rate and overtime rate become.

On March 9, 1999, the trial court heard both motions. After taking the matter under submission, it denied Employer's motion for summary judgment and granted respondent's motion for summary adjudication. It concluded that federal preemption did not exist; that the agency's determination of its own regulation deserved great weight; and that *Skyline*

Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 239 "still governs as to calculating overtime wages."

Employer amended its answer to assert a third affirmative defense, that it had made additional overtime payments which should be credited against any liability. The matter proceeded to trial in October 2000. At trial, Employer withdrew its third affirmative defense, respondent withdrew its second cause of action for waiting time penalties, and the parties stipulated that the amount of overtime wages due, based on respondent's interpretation as adopted by the trial court, was $286,683.87. Judgment was entered accordingly on December 8, 2000. Employer's motion for new trial was denied and it appealed.

DISCUSSION

I. Preemption

Pursuant to section 301 of the Labor Management Relations Act (29 U.S.C. § 185 (a)), federal law exclusively governs suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. (*Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 393.) Section 301 has been construed to cover most state law actions that require interpretation of labor agreements to ensure uniformity. (*Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 403.) "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a section 301 claim or dismissed as preempted by federal labor-contract law." (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 220, internal citations omitted.) Preemption has also been applied when the "heart" of a state law complaint is a clause in the collective bargaining agreement (sometimes referred to as a CBA) (*Caterpillar,*

supra, 482 U.S. at p. 394), or if resolution of the state law claim depends on the meaning of or requires the interpretation of a collective bargaining agreement. (*Lingle, supra*, at pp. 405-410.) However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by section 301." (*Allis-Chalmers, supra,* 471 U.S. at p. 211; *Caterpillar Inc., supra,* 482 U.S. at p. 396, fn. 10.)

Preemption should not be lightly inferred. (*Hawaiian Airlines, Inc. v. Norris* (1994) 512 U.S. 246, 252.) Section 301 should only be applied to "state law purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement.'" (*Livadas v. Bradshaw*, (1994) 512 U.S. 107, 123; *Builders & Contractors v. Intern. of Elec. Workers*, (9th Cir. 1997) 109 F.3d 1353, 1357.) When liability is governed by independent state law, the mere need to "look to" the collective bargaining agreement for damages computation is no reason to hold the state law claim defeated by section 301. (*Lingle, supra*, 486 U.S. at p. 413, fn. 12.) "Purely factual questions" do not require a court to interpret any term of a collective-bargaining agreement. (*Lingle v. Norge, supra*, 486 U.S. at p. 407.)

"[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." (*Livadas, supra,* 512 U.S. at p. 124; citing *Lingle, supra.*) In *Livadas*, a terminated union employee sought penalties for the period between her discharge and the date she received the wages due her. The issue raised was a question of state law, entirely independent of any understanding embodied in the collective bargaining agreement. There was no indication that there was a dispute over the amount to which the employee would be entitled as damages. (512 U.S. at p. 125.)

Very recently, the Ninth Circuit noted: "The demarcation between preempted claims and those that survive section 301's reach is not, however, a line that lends itself to analytical precision. As the Supreme Court acknowledged in *Livadas*, '[T]he Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and [*Allis-Chalmers*].' [Citation.] And little wonder. 'Substantial dependence' on a CBA is an inexact concept, turning on the specific facts of each case, and the distinction between 'looking to' a CBA and 'interpreting' it is not always clear or amenable to a bright-line test. [Citations.]" (*Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 691.)

Respondent relies on *Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal.App.3d 239 to support its argument that California law, not federal law should apply.

In *Skyline*, salaried salespeople who worked a fluctuating workweek filed a claim with the Department of Industrial Relations, Division of Labor Standards Enforcement (the LSE) alleging that their employer improperly computed their overtime pay. (*Id.* at p. 244.) The relevant regulation was substantially similar to the one at issue here, providing that any employee who worked longer than 8 hours daily or 40 hours weekly would be compensated at one and one-half times the employee's regular rate. The salespeople were guaranteed a fixed minimum weekly salary, but were paid overtime compensation for all work performed over 40 hours in any given workweek. Their employer computed overtime pay in the same manner as the federal standard applied here by Employer: by dividing the employee's weekly salary by the number of hours actually worked in a given week. Under this method, as in the PPR, the more hours the employee worked, the lower the regular rate became. (*Id.* at p. 245.)

In *Skyline*, as here, the employer maintained that its method for deterring overtime pay was valid as sanctioned

under federal law. The *Skyline* court considered the conflict between federal and state law and concluded that federal law did not preempt state law because the Fair Labor Standards Act (FLSA, 29 U.S.C. §§ 201-219) specifically states that: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." (29 U.S.C. § 218, subd. (a).) Federal regulations also provide that where state or local laws provide greater protection to the employee, they shall be interpreted to override the provisions of the FLSA. (Id. at pp. 250-251, citing 29 C.F.R. § 778.5.) The *Skyline* court concluded that since the number of hours required to be worked before the overtime rate is applied is less under state law then under federal law, the State of California provides for a lower maximum workweek, and thus comes within the express savings clause of the FLSA. (*Id.* at p. 252.)

Employer argues that *Skyline* was expressly disapproved in *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557 and is no longer good law.

In *Tidewater*, employees of companies that transported workers and supplies to offshore oil drilling platforms filed lawsuits against their employer seeking retroactive overtime pay. The employers responded by filing a lawsuit for injunctive relief, which was granted by the superior court. On appeal, the Supreme Court affirmed the granting of the injunction. It held, *inter alia*, that California could regulate conduct outside its territorial boundaries, and that federal law did not conflict with or otherwise preempt state regulation of the employee's overtime pay. (*Id.* at p. 566.) The *Tidewater* court, however, also considered whether the DLSE's policy for determining whether IWC wage orders apply to maritime employees constituted a regulation within the meaning of the

Administrative Procedure Act (APA, Gov. Code, § 11340, *et seq.*). It disapproved of Skyline only to the extent that it concluded that the DLSE's policy for calculating overtime was not a regulation within the meaning of the APA. (*Id.* at p. 573.) Therefore, we disagree with Employer's contention that the *Skyline* case is not applicable here.

Skyline has been followed in *Alcala v. Western AG Enterprises*, (1986) 182 Cal.App.3d 546, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 and *Ghory v. Al-Lahham*, (1989) 209 Cal.App.3d 1487. It is clear that *Skyline* remains good law with respect to the proposition that the State may use its own definition of "regular rate" and may set its own standards regarding the adequacy of overtime pay as long as it does not fall below the federal standards. Moreover, *Skyline* is consistent with the principle that establishment of labor standards falls within the traditional police power of the State. (*Fort Halifax Packing Co. v. Coyne*, (1987) 482 U.S. 1, 21; *Lingle v. Norge, supra*, 486 U.S. at p. 411.)

Employer also attempts to distinguish *Skyline,* arguing that the PPR provides for compensation on a "piece-rate" basis, not an hourly basis. We disagree with this characterization. As the trial court noted, Employer's pay rate is truly a hybrid system. Routes are categorized as to "difficulty." The meter readers are assigned a certain number of routes to complete during a given day, based largely on the difficulty assessment. The assignments are made assuming a traditional eight-hour work day. Compensation is based upon completion of that number of routes but is also based on a predetermined number of hours. If, however, a meter reader consistently does not complete that number of routes in eight hours, it may affect his or her performance rating, and may effect a reassignment of routes. Meter readers cannot simply choose how many routes they wish to complete in a day—they are penalized or reassigned if they cannot finish the number prescribed. Neither may they choose to complete more

than the specified number—that option must be specifically assigned by Employer. The amount of pay is specifically fixed as a "per hour assigned" amount in the PPR. Employer's computer payroll system is based on an eight hour day and 40-hour workweek, although Employer goes to elaborate lengths to "fool" the computer system. It is clear that the PPR is not truly a piece-rate system, and thus we cannot avoid following *Skyline* on that basis.

In its briefs, Employer relied extensively on *Firestone v. Southern California Gas Co.*, (9th Cir. 2000) 219 F.3d 1063, a case brought against Employer in this case by four meter readers regarding the same 1995 PPR at issue here. The case was not certified as a class action.

During the briefing process, a petition for rehearing was filed, and the Ninth Circuit issued an order deferring action on the petition pending the completion of proceedings in *Cramer v. Consolidated Freightways, Inc., supra*, 255 F.3d 683. An opinion in *Cramer* was filed in June 2001.

After this case had been argued and submitted, on February 12, 2002, the Ninth Circuit Court of Appeals denied a rehearing in *Firestone* and issued an opinion, concluding that there was no change in result necessitated by the *Cramer* opinion. The opinion affirmed that the claim of the meter readers was preempted by the LMRA because, "The parties in this case disagree about which rate in the contract is the 'regular' rate and, thus, disagree on whether plaintiffs are receiving a 'premium' for overtime work. Resolving this question, we held, requires interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accept. [¶] We conclude that *Cramer* does not change this result. Resolution of plaintiffs' claim to overtime pay under state law cannot be decided by mere reference to unambiguous terms of the agreement." 255 F3d 683 (2002 WL 207025.)

This case does not present a disputed disagreement over interpretation of the collective bargaining agreement. The parties do not dispute how Employer calculates the overtime wages. Thus, the issue is not how to resolve a dispute over the interpretation of the PPR, but a legal question of whether the PPR complies with state law.

Turning to the facts of this case, the PPR does not define "regular rate" of pay. The PPR specifies that "qualified" meter readers are paid "$12.38 per hour assigned," except for overtime conditions. Apparently this hourly rate is set pursuant to the collective bargaining agreement and may vary from year to year. "Unassigned overtime premiums" are paid when a meter reader takes longer than eight hours to complete a certain number of routes. This is distinguishable from "assigned overtime" which occurs when a meter reader is asked to complete more than the normally assigned number of routes, regardless of the number of hours worked. It is the unassigned overtime premium with which we are here concerned.

According to the literal language of the PPR, in unassigned overtime, the number of hours actually worked is multiplied by the ratio of assigned hours over actual hours. The resulting product is multiplied by a complex formula, which yields a number of "overtime hours" that is only a fraction of the number of actual hours worked in excess of eight. The PPR goes on to explain that the Employers' payroll system was not designed to accommodate this method of payment, and thus it is necessary to "fool the payroll system" by posting all compensation on an hourly basis, and then the hourly wage for overtime hours is multiplied by 1.5.

We need not interpret the complex formula set forth in the PPR because the parties do not dispute that, in actuality, Employer computes the overtime compensation as follows: the daily rate is divided by the number of actual hours worked, which results in a figure which represents the

"regular rate" of compensation and then one and one-half times the regular rate is paid for hours worked in excess of eight. In other words, the formula in the PPR works out to be the same calculation allowed under federal law.

California law provides clear standards regarding rates of overtime pay which establish rights independent of a collective bargaining agreement. An employer and a union cannot bargain away an employee's rights under state wage statutes. (Lab. Code, § 219; *Allis Chalmers v. Lueck, supra,* 417 U.S. at p. 212, *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1111.) Nor may a defendant attempt to inject a federal question into an action that asserts what is plainly a state law claim and transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. (*Caterpillar Inc. v. Williams, supra,* 482 U.S. at p. 399; *Cramer v. Consolidated Freightways, Inc., supra,* 255 F.3d at p. 694.) Here, although the overtime compensation scheme is computed according to a complex mathematical formula in the PPR which equates with the federal standard, the parties do not dispute how overtime is calculated. Thus, even though the factual inquiry will necessarily include reference to the collective bargaining agreement, no preemption occurs. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 368.)

II. The Collective Bargaining Exemption

At this point we turn to a discussion of the exemption which is contained within subdivision (G) of Wage Order 4-89. It exempts employers from the provisions of subdivision (A) where a "collective bargaining agreement . . . provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage."

As we have previously noted, Wage Order 4-89 was promulgated by statutory authority granted to the IWC and is enforced by the Division of Labor Standards Enforcement. We agree with the trial court that we should defer to respondent's interpretation of its wage order in calculating the amount of "regular pay." (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, p. 12-13.)

Respondent's interpretation of this exemption is succinctly stated in its brief on appeal: "The exemption establishes a less exacting standard of overtime compliance for employers covered by a [collective bargaining agreement]: in particular, it eliminates the specific premium wage rates set out in subdivision 3(A) and authorizes the parties to negotiate whatever premium wage rates above the regular rate of pay they may deem appropriate for the broad range of hours constituting overtime work."

As we read this exemption in connection with subdivision 3(A), the parties to a collective bargaining agreement which provides for payment of a "cash wage rate" of at least one dollar more than the minimum wage are free to negotiate the manner of calculating overtime pay without considering the terms of subdivision 3(A) as long as a "premium" is paid. The State DLSE manual defines "premium" as any amount above "regular pay." (DLSE Enforcement Policies and Interpretations Manual § 1085; *Accord, Bay Ridge Co. v. Aaron, supra,* 334 U.S. at p. 465.) Respondent figures the "regular pay" by dividing the flat daily rate by eight. Using the figures from above, this results in a regular hourly rate of $16.56. Thus, anything paid above this amount qualifies as a "premium."

Turning to the PPR, and assuming that the meter reader worked a total of ten hours, we divide $132.48 by 10 resulting in $13.25 per hour. Multiplying $13.25 per hour by 1.5 equals an overtime rate of $19.88. This is more than $16.56, so it qualifies as a premium and the exemption

applies. But, as previously noted, a problem may be encountered as additional overtime hours are worked. For example, if 12 hours are worked, the rate of pay would not qualify: $132.48 divided by 12 equals $11.04 which, multiplied by 1.5, equals $16.56.

Employer concedes that the results of a study done over one three-month period found one occasion where a meter reader took more than 12 hours to complete the routes. In only 2 percent of the cases did the routes take more than 11 hours. Thus, it appears that under the most typical scenario, the PPR does provide for a "premium" above the "regular pay" and the exemption would apply. But, because there was at least one time it would not have applied, the court did not err in denying Employer's summary judgment motion. The matter must be remanded to the trial court for a determination of how many occasions application of the PPR resulted in a failure to qualify for the exemption and for calculation of damages, if any.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its orders granting summary judgment and denying summary adjudication and to enter new and different orders denying those motions in accordance with the principles set forth in this opinion and setting the matter for trial to adjudicate whether application of the PPR has resulted in failure of Employer to pay a premium over the regular pay of $16.56. Costs on appeal are awarded to appellant.

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX E

Labor Management Relations Act, 1947

Section 301, 29 U.S.C. § 185

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX F

INDUSTRIAL WELFARE COMMISSION
ORDER NO. 4-89

REGULATING WAGES, HOURS, AND WORKING CONDITIONS IN PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL, AND SIMILAR OCCUPATIONS

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations (Order No. 4-89) Sec. 11040. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical and Similar Occupations.

Effective July 1, 1989

1. APPLICABILITY OF ORDER. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professsional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the

following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting, or is engaged in an occupation commonly recognized as a learned or artistic profession; provided, however, that registered nurses shall not be considered to be exempt professional employees for the purposes of this subsection (2) of this order, unless they individually meet the administrative, executive, or professional criteria described in subsection (A)(1) above.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. DEFINITIONS.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semi-professional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator

operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K)"Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time. Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

(L) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, Section 200)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. HOURS AND DAYS OF WOR

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times the employee's regular rate of pay for all work over eight (8) hours in any workday or in excess of forty (40) hours in any workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday, and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of this Section 3, Hours and Days of Work, by instituting, pursuant to a written agreement voluntarily executed by the employer and by at least two-thirds (2/3) of the employees in the affected work unit following a secret ballot and before the performance of the work, a regularly

scheduled week of work consisting of such hours and days as shall be agreed upon consistent with both of the following provisions: the premium wage rate provisions of one and one-half (1½) times the employee's regular rate of pay shall apply to all hours worked in any workday in excess of the regularly scheduled hours established by the agreement for that workday up to twelve (12) hours a workday, or to all hours worked in excess of 40 hours per week; and the premium wage rate provisions of double the employee's regular rate of pay shall apply to all hours worked in excess of twelve (12) hours per day and to all hours worked in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays in the written agreement.

(1) Prior to the secret ballot vote, any employer who proposes to institute an alternative schedule shall make a disclosure in writing to the affected employees, including the effects of the proposed schedule on the employees' wages, hours, and benefits. Such a disclosure shall include meetings duly noticed, for the specific purpose of discussing the effects of alternative scheduling. Failure to comply with this section shall make the election null and void.

(2) Any employer who institutes a regularly scheduled week of work pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the vote which authorized the schedule and is unable or unwilling to work it. An employer shall not be required to offer an alternative work assignment to an employee if an alternative work assignment is not available or if the employee was hired after the adoption of the alternative schedule.

(3) After a lapse of twelve (12) months and upon petition of one-third (1/3) of the affected employees, a new vote by secret ballot shall be held and a two-thirds (2/3) vote of the affected employees will be required to reverse the

agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of time for compliance.

(4) For purposes of Section 3(B), affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(C) Provisions of subsections (A) and (B) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half (½) of that employee's compensation represents commissions.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsections (A) or (B) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m.,

facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Code of Regulations, Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

(I) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

* * * *

12. REST PERIODS. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

Supreme Court, U.S.
FILED
MAY 31 2002

No. 01-1582

IN THE

Supreme Court of the United States

SAMUEL FIRESTONE, CALVIN MIYASHIRO, JACK PUTNAM, AND BRIAN FRAZEN,

Petitioners,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a state statute or regulation fixes a minimum labor standard requiring employers to pay their employees a "premium wage rate" which is greater than their "regular rate" for all work in excess of 8 hours in one day and 40 hours in one week, do the terms "premium wage rate" and "regular rate" as found in that standard require the interpretation of a collective bargaining agreement such that any claim by a union employee to enforce the standard is pre-empted by Section 301 of the Labor Management Relations Act?

2. If the answer to the first issue is yes, can a state statute or regulation allowing unions to "opt out" of its minimum labor standards fix as its test for whether a union has elected to opt out a procedure which requires the interpretation of a collective bargaining agreement without having the opt-out test itself be pre-empted under Section 301 of the Labor Management Relations Act?

3. If a claim created by state law requires the interpretation of a collective bargaining agreement, does pre-emption by Section 301 of the Labor Management Relations Act require that the claim be substantially extinguished?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below. Pursuant to Rule 29.6 of the Rules of this Court, respondent Southern California Gas Company states that it is a California corporation whose parent corporation is Sempra Energy, also a California corporation, and that no other publicly held company owns ten percent or more of its stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners present three questions for review and then virtually ignore those questions in the body of their petition. Such a gambit seems appropriate, given the unsuitability of each of those issues for review on this or any other record. This case involves nothing more than the lower court's straightforward application of well-settled legal principles to the collective bargaining agreement at issue. The lower court expressly cited and followed this Court's precedents regarding pre-emption of state-law claims under Section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185. Given the fact-specific nature of the pre-emption inquiry, the implications of the decision below extend to only *five* parties: the four individual petitioners and respondent Southern California Gas Company ("SCGC").

Indeed, this case does not properly present any of the questions posed. Among other things, the first question is so broad as to be irrelevant, because the obvious answer compelled by this Court's pre-emption jurisprudence is that the LMRA pre-empts some state-law overtime claims but not others, depending on the extent to which a claim requires interpretation of a collective bargaining agreement. The second question confuses pre-emption under the LMRA with pre-emption under the National Labor Relations Act (the "NLRA") and was not addressed below. And the third question is based on an apparent misstatement of a footnote in a decision of this Court, was not raised below until petitioners sought rehearing, and was not addressed by the lower court.

Moreover, petitioners concede, as they must, that the state-law claim that they currently ask this Court to rescue from pre-emption has itself been obliterated by the California courts. In other words, petitioners would lose this case even if this Court reverses the pre-emption ruling. This case is in all respects unworthy of this Court's review.

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 4a-13a, 1a-3a) are reported at 219 F.3d 1063 (9th Cir. 2000) and 281 F.3d 801 (9th Cir. 2002), respectively. The opinion of the District Court (Pet. App. 14a-31a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2000. A petition for panel rehearing and suggestion for rehearing en banc was denied on February 12, 2002. Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides, in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." The full text of Section 301 is reproduced at Pet. App. 47a-48a.

Section 3(G) of the version of California Industrial Welfare Commission Wage Order 4, Cal. Code Regs. tit. 8, § 11040(3)(G), that was in effect during the time period relevant to this litigation – 1995 to 1998 – provides, in pertinent part: "[T]his section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." The full text of this former version of Wage Order 4, also known as Wage Order 4-89, is reproduced at Pet. App. 49a-56a.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are four individual former full-time meter readers for SCGC. C.A. Excerpts 156, 157. In 1995, SCGC and the unions representing petitioners adopted, through collective bargaining, a compensation arrangement entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes." Under that system, all meter readers were paid flat sums for completing assigned meter reading routes. SCGC employed "A" meter readers, who were guaranteed a day rate equal to eight hours' pay, and "B" meter readers, who worked shorter routes and were guaranteed a day rate equal to 6.75 hours' pay. The flat sum paid for each route was calculated by multiplying the hourly rate set forth in the collective bargaining agreement (the "CBA") – $16.56 per hour until August 1, 1997, and $17.77 thereafter – by the amount of time SCGC allotted for the route. Meter readers who completed their routes in less than the allotted time nevertheless received the full flat sum designated for their route. Pet. App. 6a; C.A. Excerpts 112-113.

Meter readers who took more than eight hours to complete their routes received additional compensation for this overtime work. For work days assigned by SCGC to exceed eight hours – e.g., a route designated to take ten hours and completed in ten hours – the meter reader would receive, in addition to a flat sum for the route equal to the total allotted hours multiplied by the CBA hourly rate, an overtime premium of one half of that hourly rate for the allotted hours beyond eight.[1] C.A. Excerpts 114, 132.

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[1] Thus, in the example given, a meter reader who completed in ten hours a route for which SCGC allotted ten hours would receive a flat sum equal to the contract hourly rate (i.e., $16.56 or $17.77 per hour) for the allotted ten hours and an overtime premium of

For unassigned overtime – e.g., a route designated to take eight hours and completed in ten hours – the Pay-Per-Route document calls for the employee to receive the flat sum for the allotted time (i.e., the hourly rate multiplied by the allotted hours), plus an overtime premium calculated as follows: *(assigned hours / actual hours) x 0.3334 x (actual hours - 8) x (1.5 x hourly rate)*. Pet. App. 6a-7a; C.A. Excerpts 133-135. Although the subject of a factual dispute below, SCGC actually paid its meter readers for unassigned overtime using a slightly different formula that yields the same result, because of the need to adapt SCGC's compensation system to the computerized payroll system. Meter readers working unassigned overtime actually were paid their flat sum (i.e., the allotted hours multiplied by the contractual hourly rate), plus an overtime premium calculated as follows: *(flat sum / total hours worked) x (actual hours - 8) x 0.5*. Pet. App. 6a-7a; C.A. Excerpts 113, 114, 146. The actual payments to SCGC meter readers were designed to comply with the U.S. Department of Labor's Fair Labor Standards Act regulations applicable to "day rate" or "piece rate" compensation systems, 29 C.F.R. §§ 778.111-.112. C.A. Excerpts 113.

SCGC meter readers rarely worked substantial amounts of overtime. SCGC studies demonstrated that on average "A" meter readers worked seven hours and three minutes per day. Eighty-four percent of "A" meter readers complete their work in less than eight hours per day. Only one in five hundred meter routes have taken more than eleven hours to complete, and on only one occasion during a three-month study of 6,877 routes did a meter reader take more than twelve hours to complete an eight-hour assignment. C.A. Excerpts 115. Petitioners presented no evidence below suggesting that they ever worked twelve or more hours in a day.

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one half that rate (i.e., $8.28 or $8.89 per hour) for the ninth and tenth hours. C.A. Excerpts 114.

One of the signatory unions to the CBA, along with its members, filed grievances challenging the Pay-Per-Route system. The union and its members elected *not* to proceed to arbitration on their grievances, however, because they concluded that the arbitrator would reject their claims and rule in favor of SCGC. Further bargaining in February 1998 stemming from union dissatisfaction with the Pay-Per-Route system led to the elimination of the position of full-time meter reader. Pet. App. 20a; C.A. Excerpts 152-153. Therefore, most, if not all, of the parties' dispute is limited to the time period 1995 through 1998.

II. Proceedings In The District Court

Petitioners' complaint, filed in the District Court for the Central District of California as a putative class action, alleged, inter alia, that SCGC failed to pay daily and weekly overtime pursuant to the version of California Industrial Welfare Commission Wage Order 4 then in effect (and amended numerous times since).[2] C.A. Excerpts 154-167; Pet. App. 49a-56a. SCGC moved for summary judgment, arguing, inter alia, that petitioners' state-law overtime claim is pre-empted under Section 301 of the LMRA because its resolution requires interpreting the CBA, including the Pay-Per-Route document. C.A. Excerpts 111; Pet. App. 14a-15a.

The District Court granted SCGC's motion, concluding that petitioners' state-law overtime claim is pre-empted. Pet. App. 30a-31a. The District Court carefully reviewed and considered this Court's LMRA pre-emption case law. *Id.* at 23a-25a. The District Court correctly noted that California law provides an exemption from its overtime requirements for any employee "covered by a collective bargaining agreement if said agreement provides premium wage rates for

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[2] No class was ever certified. Petitioners also asserted other claims not relevant to their certiorari petition.

overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." *Id.* at 26a (quoting Section 3(G) of the former version of Wage Order 4, reproduced at Pet. App. 56a). Thus, if the exemption applied, petitioners' California-law overtime claim failed.[3]

While petitioners were indisputably covered by a CBA that provided for the requisite cash wage rate, the District Court observed that the parties disputed whether the "agreement provides premium wage rates" for overtime. The court noted SCGC's argument that a fact finder must interpret the CBA to determine whether petitioners' pay constitutes compensation on an hourly, salary, piece-rate, or day-rate basis, which in turn determines petitioners' "regular rate" of pay under California law for purposes of calculating overtime,[4]

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[3] The District Court rejected petitioners' argument that the Section 3(G) exemption was pre-empted by virtue of this Court's holding in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), noting that the Ninth Circuit had upheld an identical exemption in *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 73 (9th Cir. 1995), as valid under *Livadas*. Pet. App. 26a.

[4] Under California law, an employee paid on an hourly basis and not otherwise exempt from the overtime laws is entitled to receive one and one half times his or her "regular rate," which will equal the employee's normal hourly rate, for most overtime hours, with double-time pay for certain overtime hours. Pet. App. 53a. For non-exempt salaried employees, by contrast, the California Division of Labor Standards Enforcement, the administrative agency charged with enforcing California's Labor Code, took the position, subsequently codified at Section 515(d) of the California Labor Code, that the regular rate is determined by dividing total non-discretionary weekly earnings, less any overtime premium pay, by no more than the first forty hours of work. *Skyline Homes, Inc. v. Department of Indus. Relations*, 165 Cal. App. 3d 239, 245, 211 Cal. Rptr. 792, 795 (1985), *overruled on other grounds*, *Tidewater*

which ultimately determines whether the payments provided for by the CBA constitute "premium" wages for overtime hours. Because the parties disputed petitioners' "regular rate" and whether the CBA provided for "premium" pay, the District Court determined that petitioners' California-law overtime claim required interpreting, not "merely referring to," the CBA. Pet. App. 27a-28a. Because petitioners had failed to exhaust their mandatory grievance and arbitration procedure, the District Court entered summary judgment in SCGC's favor. *Id.* at 28a.

Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 927 P.2d 296 (Cal. 1996). Because the entire salary is deemed to be allocated to only the first forty hours of work, most overtime hours must be compensated at one and one half times the regular rate, in addition to the employee's salary. Pet. App. 53. If, on the other hand, a non-exempt employee is deemed to work on a piece-rate or day-rate basis, the regular rate is determined by dividing total weekly pay by *all* hours worked. C.A. Excerpts 45-47, 66. An additional overtime premium of one-half of the regular rate per overtime hour would then be owed.

This difference in methodology yields a lower regular rate for piece-rate or day-rate workers than for hourly or salaried workers with similar wages and hours, and the overtime owed to a salaried non-exempt employee is more than three times the overtime owed to a non-exempt piece-rate or day-rate employee, a ratio that increases with hours worked. For example, if a salaried non-exempt employee and a piece-rate non-exempt employee each work 60 hours in a week for $600 in wages, the salaried employee's regular rate would be $600 divided by 40 hours, or $15 per hour. The employer would owe that employee twenty hours' overtime pay at time-and-a-half, or 20 x 1.5 x $15, which is $450. The regular rate for the piece-rate employee would be $600 divided by 60 hours, or $10 per hour. The overtime due would be twenty hours at half-time, or 20 x 0.5 x $10, which is $100.

III. Proceedings In The Court Of Appeals

Petitioners appealed to the Court of Appeals for the Ninth Circuit, which affirmed on essentially the same bases stated by the District Court. Pet. App. 4a-11a. The court conducted its own thorough and detailed review of this Court's LMRA pre-emption decisions, concluding that "resolution of this issue requires interpretation of the agreement" and that "the state law overtime claim is therefore pre-empted." *Id.* at 8a. The Court of Appeals also rejected petitioners' argument that California's Section 3(G) exemption is pre-empted, holding that the exemption was a "familiar and narrowly drawn opt-out provision[]" that is valid under *Livadas* and the Ninth Circuit's prior construction of an identical California exemption in *National Broadcasting Co.* *Id.* at 10a-11a.

Petitioners then sought panel and en banc rehearing, reiterating many of their prior points. Petitioners also argued for the first time that the Ninth Circuit should address whether this case is suitable for arbitration pursuant to footnote 18 of *Livadas*, in which this Court commented that "[h]olding the plaintiff's cause of action substantively[5] extinguished may not . . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." Appellants' Pet. for Reh'g and Reh'g En Banc 14 (quoting *Livadas*, 512 U.S. at 124 n.18). The Ninth Circuit denied rehearing and rehearing en banc without addressing petitioners' new argument. Pet. App. 1a-3a.

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[5] Petitioners misquoted the footnote as saying "substantially" extinguished, an error they repeat in their petition, including in the third question presented.

IV. "Companion Proceedings" In State Court Rejecting Petitioners' State-Law Claim On The Merits

As petitioners note, after this action was filed, the State of California instituted "[c]ompanion [p]roceedings" in California state court "over the exact same overtime practice with respect to the exact same class of employees (meter readers)."[6] Pet. 12. The Superior Court granted summary judgment in favor of the State, and SCGC appealed. On appeal, the California Court of Appeal rejected SCGC's Section 301 pre-emption argument, concluding – erroneously in SCGC's view – that "[t]he parties do not dispute how Employer calculates the overtime wages." *Lujan v. Southern Cal. Gas Co.*, 96 Cal. App. 4th 1200, 1210, 117 Cal. Rptr. 2d 828, 836 (2002), *petition for review filed* (Apr. 23, 2002).[7]

Although the California court found no LMRA pre-emption, the court nevertheless reversed *on the merits* the summary judgment that had been granted in favor of the State, construing Wage Order 4 as exempting SCGC from overtime liability in all instances except where the overtime rate paid does not exceed the contractual hourly rate (i.e., $16.56 or $17.77, depending on the date). Based on the indisputable rarity of meter readers working very long days, the Court of Appeal held that "under the most typical scenario, the PPR [Pay-Per-Route] does provide for a 'premium' above the 'regular pay' and the exemption would apply." *Id.* at 1212, 117 Cal. Rptr. at 837. Indeed, under the examples that the Court of Appeal used, SCGC would owe overtime *only*

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[6] The state court action, for which class certification was unnecessary, was an enforcement action on behalf of virtually the same class of employees petitioners purported to represent in their federal court action, but for which certification was never granted.

[7] Arthur Lujan was substituted as named plaintiff upon replacing Jose Millan as California Labor Commissioner, a change that occurred before formal publication of the California court's opinion.

where an employee worked twelve or more hours in a day, a situation that the record established occurred only once in an entire three-month period. *Id.* Because there was a possibility that a very small handful of SCGC employees might qualify for overtime for a day or two here and there, the court remanded the matter to the Superior Court to determine which employees, "if any," qualify for overtime in light of this interpretation of Wage Order 4. *Id.* at 1212-13, 117 Cal. Rptr. at 837-38.

REASONS FOR DENYING THE WRIT

The courts below applied to the particular CBA at issue the well-settled principles established by this Court's decisions concerning pre-emption under the LMRA and the NLRA. The lower courts correctly engaged in the requisite analysis and presented their straightforward conclusions. In doing so, the lower courts neither departed from this Court's decisions nor articulated new legal rules. Before discussing why the questions presented are inappropriate for review by this Court, some background concerning LMRA and NLRA pre-emption is appropriate.

Over the past five decades, this Court has developed and articulated the relevant standards governing LMRA pre-emption. In order to further the strong federal interest in uniform interpretation of collective bargaining agreements, "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Not every state-law claim involving unionized employees, however, is pre-empted under Section 301. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation . . . does not require the claim to be extinguished" under the LMRA. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994).

Nevertheless, this Court has long acknowledged the importance of alternative dispute resolution to federal labor law: "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). This Court has recognized that "[c]laims involving vacation or overtime pay, work assignment, [and] unfair discharge" are within the "range of disputes traditionally resolved through arbitration." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). "A rule that permitted an individual to sidestep available grievance procedures would," as this Court has observed, "cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220 (citation omitted). Thus, under the LMRA, "when resolution of a state-law claim is *substantially dependent upon analysis of the terms of an agreement* made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* (citation omitted) (emphasis added).

With regard to pre-emption under the NLRA, this Court has applied traditional conflict pre-emption analysis. Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to bargain collectively. State laws that nullify the rights of employees under the NLRA have been held to be pre-empted under the Supremacy Clause of the United States Constitution as in conflict with federal law. "A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." *Livadas*, 512 U.S. at 116 (invalidating state agency's policy of declining to process wage claims filed by employees covered by CBA). *See also Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967) (invalidat-

ing state law denying unemployment benefits to persons who had filed unfair labor practice charge pursuant to NLRA).

Where, however, a state law differentiating between unionized and non-unionized employees "works no intrusion on collective bargaining" and instead "balance[s] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment," there is no conflict with federal law, and therefore no pre-emption under the NLRA. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987) (rejecting NLRA pre-emption challenge to state statute providing one week's severance pay for employees in the event of a plant closing, but exempting employees covered by a contract providing for severance pay). Thus, where the "minimum protections" of state law are "relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement), but only by the parties' express agreement on different terms," the NLRA does not pre-empt state law. *Livadas*, 512 U.S. at 131. States frequently enact such "opt out" statutes, which permit unionized employees collectively to bargain away certain rights granted by state labor law in exchange for other benefits and concessions from their employer, and this Court has endorsed "the validity of these familiar and narrowly drawn opt-out provisions." *Id.* at 132.

The petitioners' questions presented can be properly evaluated only in light of this substantial body of settled precedent.

I. The First Question Presented Is Not Appropriate For Review

A. The First Question Is Not Properly Presented On This Record

The first question asks this Court to decide whether, regardless of the terms of an applicable collective bargaining agreement, determining an employee's "regular rate" of pay

or whether the employee has received "premium" pay in connection with a state-law wage and hour claim requires interpretation of the CBA and thus leads to pre-emption under Section 301 of the LMRA. *See Allis-Chalmers*, 471 U.S. at 220. This question was not addressed below, and this Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996).

Moreover, the first question presented is far too broad to be of any help to petitioners. Plainly, there are some instances in which a union member's state-law wage claim can be resolved without interpreting the CBA. For example, where an employee and an employer agree on the regular rate and the existence (or not) of premium pay, but perhaps disagree concerning other aspects of a wage claim such as the number of days or hours worked, there would be no need to interpret the CBA to determine the regular or premium rate. Likewise, if an employee and an employer agree that the method of compensation is a flat weekly salary, or a day-rate or piece-rate arrangement, or a commission program, then there may be no need to interpret the CBA to determine the regular or premium rate. Moreover, if the CBA is for some reason silent regarding overtime, then resolution of an overtime claim would probably not implicate the terms of the CBA.

On the other hand, there clearly are cases in which determining the regular or premium rate will require CBA interpretation. Where, for example, a CBA provides for various pay grades, and an employee sues alleging an entitlement to overtime based on a higher pay grade than the rate at which he or she was compensated, it would likely be necessary to interpret the terms of the CBA to evaluate whether the employee was entitled to the higher regular rate. Similarly, where, as here, an employer and certain of its employees dispute the nature of the compensation system, and the CBA

sets forth and defines the compensation system, the CBA must be interpreted to determine the regular rate and the presence of any premium wage.

Thus, the first question presented is not formulated in a way that lends itself to meaningful application to this case. Nor did the lower courts decide that question. Instead, those courts answered the very different, and much narrower, question whether these petitioners' state-law overtime claim is pre-empted in light of this particular CBA.

B. The First Question Seeks Review Of Only Factual Determinations

The lower courts expressly cited and applied this Court's LMRA pre-emption decisions without announcing new legal rules or departing from this Court's precedents. Pet. App. 5a-10a, 23a-28a. Petitioners do not challenge the legal rules that the courts applied, but rather the specific application of those rules to the particular CBA at issue. Both the District Court and the Court of Appeals found that they would be required to interpret disputed aspects of the CBA in order to determine petitioners' "regular rate" of pay and the existence of "premium" overtime pay in the course of resolving petitioners' state-law overtime claim, and thus Section 301 of the LMRA pre-empted that claim.

It has long been settled that interpreting a collective bargaining agreement involves more than merely examining the four corners of a document. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Here, the parties dispute whether petitioners were paid on an hourly, salaried, day-rate, or piece-rate basis, an issue that must be decided before petitioners' overtime claim

could be adjudicated. The terms of the CBA itself, the parties' conduct under the CBA, the parties' intent in entering into the CBA, and the course of the collective bargaining would all potentially be relevant to this inquiry. Petitioners have failed to demonstrate either legal error or abuse of discretion by the District Court in finding that petitioners' state-law claim is "substantially dependent upon analysis of" the CBA, *Allis-Chalmers*, 471 U.S. at 220; nor have they shown legal error by the Court of Appeals in affirming the District Court's pre-emption finding.

Petitioners' reliance on *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945), and *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), for the proposition that their "regular rate" is a "fact" with an existence entirely independent of the CBA is misplaced. First, those cases predate the enactment of the LMRA by two years and thus are of questionable relevance regarding whether determining a "regular rate" requires CBA interpretation. Second, those cases, properly construed, stand only for the narrower proposition that a nominal "regular rate" specified in a CBA will be disregarded by the courts when it is "wholly unrealistic and artificial" and does not comport with the parties' actual practices. *Youngerman-Reynolds*, 325 U.S. at 424 (quotation omitted); *see also Harnischfeger*, 325 U.S. at 430 (emphasizing "actual payments" rather than "contract nomenclature"). Third, case law from this Court following the enactment of the LMRA demonstrates that "*the words of and the practices under the contract* are the determinative factors in finding the regular rate for each individual." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) (emphasis added). Under *United Steelworkers*, such matters are properly factual issues for the arbitrator to evaluate, and thus they give rise to Section 301 pre-emption.

The manner in which the courts below applied LMRA pre-emption case law to one specific CBA is not a matter of

great national importance. Because each CBA is different, this case is *sui generis* and has no implications beyond the five parties to the litigation. Petitioners merely dispute a factual finding, which is not a proper basis for certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption

It is the long-settled practice of this Court to avoid adjudicating constitutional issues unnecessarily or prematurely. *See, e.g., Three Affiliated Tribes of Fort Bethold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157-58 (1984); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that a court should "not anticipate a question of constitutional law in advance of the necessity of deciding it"); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Pre-emption of state-law claims pursuant to Section 301 of the LMRA, of course, implicates the Supremacy Clause of Article VI of the United States Constitution. *See, e.g., Allis-Chalmers*, 471 U.S. at 208.

Petitioners ask this Court to reverse the Ninth Circuit's pre-emption ruling so that they may proceed with their overtime claim pursuant to California law. The California courts have already spoken, however, concerning the merits of petitioners' overtime claim. The California Court of Appeal in *Lujan v. Southern California Gas Co.* held that SCGC's compensation system for meter readers does not violate California law except in the extremely rare instance (once in an entire three-month period) in which an employee works twelve or more hours in a day. 96 Cal. App. 4th at 1212, 117 Cal. Rptr. 2d at 837. Thus, it is unnecessary for this Court to

decide the Supremacy Clause issue. Regardless of how the pre-emption issue is decided, petitioners still lose. Thus, the case is effectively moot, as petitioners acknowledge in conceding that "there is very little left of their state-law claims." Pet. 12-13. Although petitioners make a feeble attempt to minimize the effect of *Lujan* by suggesting that if their state-law claim is reinstated they could argue below that the California Court of Appeal erred in its interpretation of Wage Order 4, Pet. 13 n.8, they offer no plausible scenario under which they could persuade the Ninth Circuit that the California state court misinterpreted California law. Moreover, the pre-emption of a state-law claim that itself has no merit implicates no significant state interests or individual rights.

For these reasons, certiorari should be denied as to the first question presented.

II. The Second Question Presented Is Not Appropriate For Review

A. The Second Question Confuses LMRA And NLRA Pre-Emption And Was Never Addressed Below

The second question asks the Court to decide whether a state law may use as its standard for an opt-out provision a test that may lead to LMRA pre-emption by virtue of the need to interpret a CBA, without that opt-out provision itself being pre-empted by the LMRA. That issue was not addressed below, nor do petitioners cite any authority bearing on that issue. *See Matsushita*, 516 U.S. at 379 n.5 ("[W]e generally do not address arguments that were not the basis for the decision below."). In reality, petitioners have confused pre-emption under the NLRA and pre-emption under the LMRA.

Indeed, both the District Court and the Ninth Circuit understood petitioners to be arguing that California's Section 3(G) exemption was pre-empted by the NLRA, not the

LMRA. Pet. App. 10a-11a, 26a. This result is not surprising, given that the decisions relied on by petitioners below for the proposition that Section 3(G) is pre-empted because it allegedly burdens the rights of employees to bargain collectively involve pre-emption based on conflict with the federal labor policies embodied in the NLRA. *See, e.g.*, *Livadas*, 512 U.S. at 110, 116-18 (invalidating state agency's policy of declining to process wage claims filed by employees covered by CBA: "We hold that federal law pre-empts this policy, as abridging the exercise of such employees' rights under the National Labor Relations Act . . . ."); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 6-7, 20-22 (1987) (upholding state law requiring payment of one week's severance pay upon plant closing except where employees are otherwise covered by contract providing for severance pay: "We hold . . . that the Maine law is not pre-empted by the NLRA . . . .").

As this Court's decisions make clear, the NLRA pre-empts state laws or practices that unduly burden or interfere with the collective bargaining and other rights established in the NLRA. Such pre-empted state laws or policies are deemed to conflict with, and thus must yield to, federal law pursuant to the Supremacy Clause, and as a result they have no force. *E.g.*, *Livadas*, 512 U.S. at 116-18. Of course, petitioners can identify no divergence of authority concerning whether Section 3(G) is pre-empted under the NLRA, and both the Ninth Circuit and California state courts have upheld Section 3(G) against NLRA pre-emption challenges. *See National Broad. Co.*, 70 F.3d at 73 (addressing identically worded opt-out provision in different California Wage Order); *Rawson v. Tosco Ref. Co.*, 57 Cal. App. 4th 1520, 1524-25, 67 Cal. Rptr. 2d 790, 793 (1997) (same).

LMRA pre-emption, on the other hand, does not purport to abrogate state laws that conflict with federal law. Instead, Section 301 pre-emption recharacterizes *claims* that implicate an existing CBA as arising under federal law and the CBA

itself where there is a risk of inconsistent interpretation if state law were applied. *See, e.g.*, *Allis-Chalmers*, 471 U.S. at 209-10. Thus, LMRA pre-emption achieves uniformity in CBA interpretation, whereas NLRA pre-emption removes obstacles to collective bargaining.

It simply makes no sense to ask whether Section 301 of the LMRA pre-empts California's Section 3(G) opt-out, because Section 3(G) does not give rise to a *claim* on the part of SCGC as against petitioners that could or would be recharacterized as a federal law claim under the CBA. Instead, because petitioners' claim depends on whether Section 3(G)'s criteria have been satisfied, Section 301 pre-empts petitioners' claim against SCGC. Even assuming that Section 301 pre-emption could apply to Section 3(G), however, the result would not be to invalidate Section 3(G), but rather to recharacterize the entire dispute as arising under federal law. In either event, petitioners' state-law claim is pre-empted, the same result as was obtained below.

B. The Court Of Appeals Correctly Upheld California's Collective Bargaining Agreement Exemption To Its Overtime Law As A Valid "Familiar And Narrowly Drawn" Opt-Out Provision

California's Section 3(G) opt-out provision exempts from coverage under the state overtime law "any employee covered by a collective bargaining agreement" that provides both (1) "premium wage rates for overtime work" and (2) "a cash wage rate . . . of not less than one dollar ($1.00) per hour more than the minimum wage." Pet. App. 56a. Petitioners argued below that this opt-out provision violates federal law, as construed in *Livadas*, because it denies union employees protections under state law available to non-union employees.

Livadas, however, draws a sharp distinction between state laws that unfairly burden an employee's decision to ex-

ercise rights under the NLRA as opposed to "familiar and narrowly drawn opt-out provisions" under which "union-represented employees have the full protection of the minimum standard, absent any agreement for something different." 512 U.S. at 131-32. As the Court of Appeals concluded, California's statute "neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA." Pet. App. 10a (quoting *Fort Halifax*, 482 U.S. at 20-21). Instead, Section 3(G) applies "only to those who have sought and received alternative wage protections through the collective bargaining process" and thus is valid under *Livadas* and *Fort Halifax*. Pet. App. 10a-11a. As previously noted, both federal and state courts have upheld identical opt-outs challenged under the NLRA. *See National Broad. Co.*, 70 F.3d at 73; *Rawson*, 57 Cal. App. 4th at 1524-25, 67 Cal. Rptr. 2d at 793.

The lower courts properly determined that Section 3(G) is not pre-empted by the NLRA, and that decision is in accord with the rulings of other courts. Moreover, the rulings below are entirely consistent with this Court's analysis in *Livadas*. Thus, there is no basis for granting review.

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption

As discussed above, *see supra* Part I.C, petitioners' claim fails as a matter of state law. Thus, there is no reason for this Court to decide a federal pre-emption question of constitutional dimension in aid of petitioners' still-born California overtime claim.

For these reasons, certiorari should be denied as to the second question presented.

III. The Third Question Presented Is Not Appropriate For Review

A. The Third Question Was Never Addressed Below

The third question presented, which in fact derives from a misquotation of footnote 18 of this Court's decision in *Livadas*, asks this Court to decide whether LMRA pre-emption always requires that a claim be extinguished. What petitioners apparently seek is a ruling that their claim may proceed in arbitration. Petitioners did not raise this issue below until their petition for rehearing in the Ninth Circuit, and the Ninth Circuit did not address that claim. *See Matsushita*, 516 U.S. at 379 n.5 ("[W]e generally do not address arguments that were not the basis for the decision below."). Indeed, petitioners do not identify any reason whatsoever that would support a grant of review on this fact-dependent issue notwithstanding their waiver. Even assuming that footnote 18 of *Livadas* contemplates that some category of cases might be appropriate for disposition other than through extinguishing the pre-empted claim, this case surely is not such a case, nor do petitioners even attempt to argue why their case represents an appropriate candidate for such unusual treatment.

B. Footnote 18 Of *Livadas* Is Irrelevant To This Case

In the portion of footnote 18 of *Livadas* upon which petitioners rely, this Court observed that "[h]olding the plaintiff's cause of action substantively extinguished may not . . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter. *Cf. Collyer Insulated Wire, Gulf & Western Systems Co.*, 192 N.L.R.B. 837 (1971)." 512 U.S. at 124 n.18. Assuming that their California overtime claim is pre-empted by Section 301, petitioners ask this Court "to determine whether," in lieu of the extinguishment of their state-law claim, "there are other ac-

ceptable means available, such as staying the action pending arbitration of any issue relating to the interpretation of a collective bargaining agreement." Pet. 21. Petitioners' reliance on footnote 18 is entirely inapt.

The reference to *Collyer* in footnote 18 demonstrates that the concept that this Court was addressing is that sometimes claims could be permitted to proceed to arbitration rather than being extinguished under Section 301 of the LMRA. In *Collyer*, the National Labor Relations Board articulated a policy of deferring consideration of issues arising under the NLRA pending consideration by a labor arbitrator acting pursuant to a CBA. That same policy obviously makes sense for many circumstances that might arise under the LMRA. Where a labor arbitration is underway concerning claims that fall within the scope of Section 301 preemption, it may be appropriate for courts to stay litigation pending the outcome of the arbitration.

Here, of course, upon concluding that the state-law claim was pre-empted under Section 301, the District Court found that petitioners "have failed to exhaust their remedies through the grievance and arbitration process contained in the CBAs, and in fact *specifically declined to do so* because they believed these attempts would be unsuccessful." Pet. App. 28a (emphasis added). Far from there being a pending labor arbitration involving parallel issues, petitioners actively evaded their contractual duty to pursue a grievance and arbitration. Having chosen to side-step mandatory arbitration in favor of litigating their claim, petitioners cannot now be heard to complain that they should have been permitted to arbitrate in the first place. They *were* permitted, indeed required, to do so, and they improperly elected to litigate instead. Thus, this case bears no resemblance whatsoever to the situation contemplated in footnote 18 of *Livadas*, and clarifying footnote 18 would not resolve any material issue in dispute in this case.

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Footnote 18 Of *Livadas*

As discussed above, *see supra* Part I.C, petitioners' claim fails as a matter of state law. Thus, there is no reason for this Court to address the contours of LMRA pre-emption, an issue under the Supremacy Clause. Well-settled practice dictates foregoing review in light of the inevitable result in this case. *See, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that a court should "not anticipate a question of constitutional law in advance of the necessity of deciding it").

For these reasons, certiorari should be denied as to the third question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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